No. 237 Sup. A.B.
Brief of Martin

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Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant,*
vs.
LOUIS C. BOYLE, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, *Appellee.*

CAUSES CONSOLIDATED.
No. 7427.
No. 7453.

FRANCIS LEE HIGGINSON, *Appellant,*
vs.
LOUIS C. BOYLE, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, *Appellee.*

In U. S. C. C., Dist. of Kansas, First Division.

Motion to Dismiss Appeal for Want of Necessary Parties, and Brief in Support of Said Motion.

L. C. BOYLE,
Attorney-General of the State of Kansas,
Appellee.

DAVID MARTIN,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant,*
vs.
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CAUSES CONSOLIDATED.
No. 7427.
No. 7453.
In U. S. C. C., Dist. of Kansas, First Division.

NOTICE.

To Charles U. Cotting and Francis Lee Higginson, and their counsel and solicitors, Albert H. Horton and B. P. Waggener:

Please take notice that on Monday, the 19th day of December, 1898, at Washington, D. C., at the opening of the court, or as soon thereafter as counsel can be heard, a motion to dismiss the said appeal for want of necessary parties in the above-entitled causes will be submitted to the supreme court of the United States for decision.

Annexed hereto is a copy of the motion to dismiss and of the brief in support thereof.

LOUIS C. BOYLE,
As Attorney-General of the State of Kansas,
Appellee.

By DAVID MARTIN,
His solicitor for the purposes of this motion only.

IN THE

Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee.*

Causes Consolidated.
No. 7427.
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FRANCIS LEE HIGGINSON, *Appellant*,
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In U. S. C. C., Dist. of Kansas, First Division.

Motion to Dismiss Appeal for Want of Necessary Parties.

And now comes Louis C. Boyle, as attorney-general of the state of Kansas, named as appellee herein, appearing for the purposes of this motion only, and moves the court to dismiss the proceeding called an appeal herein by Charles U. Cotting and Francis Lee Higginson, and as grounds of this motion the said Louis C. Boyle, as attorney-general of the state of Kansas, says:

First. The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust and Elliott E. Richardson were co-defendants with said Louis C. Boyle, as attorney-general of the state of Kansas, in said suits consolidated, and

they duly appeared and participated in the litigation, yet they have not been made parties either as appellants or appellees to this proceeding called an appeal, but the said Louis C. Boyle, as attorney-general of the state of Kansas, is the sole appellee, and the said Charles U. Cotting and Francis Lee Higginson are the only appellants, and said co-defendants are necessary parties to this proceeding called an appeal.

Second. The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust and Elliott E. Richardson were charged as co-defendants by the bills of complaint as joint wrong-doers with the said Louis C. Boyle, as attorney-general of the state of Kansas, against the complainants, Charles U. Cotting and Francis Lee Higginson, respectively, who are named as appellants herein, and although a decree *pro confesso* was formally entered against said co-defendants on October 28, 1897, yet on the same day said bills of complaint were dismissed on the merits, with costs taxed in favor of the said Louis C. Boyle, as attorney-general of the state of Kansas; and the dismissal of said bills became in law and in equity a joint decree of dismissal in favor of all the defendants, yet no defendant except the said Louis C. Boyle, as attorney-general of the state of Kansas, has been made a party to this proceeding called an appeal, and no citation has ever been issued against said co-defendants, and they have not become parties to this proceeding in any manner.

LOUIS C. BOYLE,
Attorney-General of the State of Kansas,
Appellee.

By DAVID MARTIN,
His Solicitor.

IN THE

Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant*,
vs.
LOUIS C. BOYLE, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, *Appellee.*

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vs.
LOUIS C. BOYLE, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, *Appellee.*

CAUSES CONSOLIDATED.
No. 7427.
No. 7453.
In U. S. C. C., Dist. of Kansas, First Division.

Brief of Attorney-General in Support of Motion to Dismiss Appeal for Want of Necessary Parties.

I.

STATEMENT.

ON March 12, 1897, by publication in the official newspaper, an act of the legislature of Kansas, approved March 3, 1897, became operative, if valid, said act being entitled "An act defining what shall constitute public stock-yards, defining the duty of the person or persons operating the same and regulating the charges thereof, and removing restrictions in the trade of dead animals, and providing penalties for

violations of this act." (Chapter 240, Session Laws of 1897.)

On March 13, 1897, Charles U. Cotting commenced suit No. 7427, in the circuit court of the United States for the district of Kansas, first division. On account of haste in bringing the action, it seemed doubtful if equity rule No. 94 had been sufficiently complied with. On March 26, 1897, Francis Lee Higginson commenced a like action, No. 7453. The defendants were the same in each case. Each complainant was a stockholder in the Kansas City Stock-Yards Company, and the other defendants, except Louis C. Boyle, as attorney-general of the state of Kansas, were officers of said corporation. It was alleged that the Stock-Yards Company and its officers had threatened to and were putting into force and effect the rates prescribed by the new act, which were much lower than had been before charged, which would greatly reduce the profits of the corporation and diminish the dividends of the complainants, and that said act was void for several reasons set forth in the bills; yet that the attorney-general was threatening to enforce said act, thereby putting the Stock-Yards Company and its officers in fear of criminal prosecutions, etc. The relief sought by each bill was substantially the same. We quote the essential part of the prayer in the Higginson case, as follows:

"Therefore your orator prays the decree of this honorable court, adjudging that it is the duty of the said defendant corporation and the said Charles F. Morse, acting president, general manager and sole managing director of said defendant corporation, for the benefit of said corporation and of your orator

and the other stockholders of said corporation, to revoke at once the orders and directions to put in force the provisions of said so-called act, referred to herein as 'Exhibit A,' and the maximum charges and prices therein specified, and that it is the duty of said defendant corporation and the said Charles F. Morse, acting president, general manager and sole managing director, for the pecuniary benefit of your orator and the other stockholders of said defendant corporation, to maintain and operate the stock-yards of said defendant corporation herein named in the same manner as they have been heretofore economically and successfully operated, and to charge for the services to be furnished, for yardage and other matters, the present existing charges (which are fair, reasonable and just); and also to sell and deliver hay, corn and other grain to stock-raisers, shippers and other persons, upon the same terms and for the same prices and in the same way such articles are now sold by said defendant corporation (which said prices, under all the circumstances and conditions, are fair, reasonable and just); and that said defendant corporation, and each of its said officers and agents named as defendants herein, shall be enjoined from obeying, observing or putting into force any of the provisions of said so-called act; and that said order and injunction issue against said defendant corporation and the said Charles F. Morse, as acting president and sole managing director thereof, and each of the other officers and agents of said defendant corporation, made parties defendant herein, commanding them and each of them to refrain from putting into force the provisions of the said so-called act or any part part thereof.

"That the said Louis C. Boyle, as attorney-general, be adjudged and decreed from attempting, as against said defendant corporation or any of its officers, agents, servants or employees, to enforce the provisions of the said so-called act or any part thereof. And also, that said order and injunction issue against the said Louis C. Boyle, as attorney-general, commanding him to refrain from harassing and annoying, by prosecution or otherwise, under the provisions of the said so-called act, the defendant corporation, the said Charles F.

Morse, or any of the other officers, servants, agents or employees of the said defendant corporation herein named.

"That the final mandatory order and injunction of this court in this case issue, compelling said defendant corporation, and the said Charles F. Morse and each of the other officers and agents of said defendant corporation herein named, to operate and maintain the said stock-yards of the said defendant corporation in the state of Kansas as they are now operated and maintained, and that they exact and collect the same charges for services performed and the same prices now demanded and received, wholly disregarding the said so-called act and all of the provisions thereof.

"That a final order, judgment and decree issue that the said so-called act, approved March 3, 1897, herein referred to as 'Exhibit A' and made a part of this bill of complaint, is unconstitutional and void and of no validity, force or effect whatever; and that all of said defendants and each of them be enjoined from enforcing or attempting to enforce the said so-called act or any of the provisions thereof.

"That a preliminary injunction may issue at once, upon the filing of this bill of complaint, against the said defendant corporation and each of its officers and agents named as defendants herein, during the pendency of this suit, strictly commanding and enjoining the said defendants and each of them, under the pains and penalties which may fall upon them and each of them in case of disobedience, that they forthwith and until the further order, judgment and decree of this court, desist from putting into force the said maximum rates, charges and prices specified in said so-called act aforesaid; and against the said Louis C. Boyle, as attorney-general, commanding and enjoining him to desist from enforcing or attempting to enforce the said so-called act against said defendant corporation and its officers and agents named as defendants herein, by arrest or otherwise, through the courts of the state or otherwise."

Temporary restraining orders were issued in each case substantially in accordance with said prayer.

The causes, being consolidated, were referred to a master, who was empowered to take testimony, and report the same, with his findings "as to all matters and things in issue upon the hearing of the preliminary injunction prayed for under the bills of complaint, . . . including, among other things, the cost of the Kansas City stock-yards, the present value of the property of the Kansas City Stock-Yards Company, the receipts and expenditures thereof, the manner of operation, including its transportation of cattle and other stock from Kansas to Missouri and other states, and from Missouri to Kansas and other states, the handling of the same as interstate commerce (if any such interstate commerce is carried on by the defendant corporation), and such other matters as may be pertinent upon the hearing of the application for the temporary injunction prayed for." (See order filed April 12, 1897.)

A great deal of testimony was taken, and the master made a full report of the facts. On the hearing before the district judge (FOSTER), it was held that the restraining orders should be vacated and the temporary injunction refused. But a stipulation was entered into October 7 (filed October 9, 1897) for the final hearing before Circuit Judge THAYER and District Judge FOSTER.

All the defendants appeared by their respective counsel in the early stages of the cases, and the defendant the Kansas City Stock-Yards Company was an active participant in the litigation throughout.

On the first hearing, April 2, 1897, on motion to

consolidate and amend, the defendants other than the attorney-general appeared by I. P. Dana, their solicitor. (See decree filed April 2, 1897.) On the next day, on the motion for a temporary injunction, they again appeared by Pratt, Dana & Black. (See decree filed April 12, 1897.)

On October 7, 1897, Pratt, Dana & Black, as solicitors for the Kansas City Stock-Yards company, entered into the stipulation for the final hearing of the cases to commence on October 18, 1897, at two o'clock, before Judges THAYER and FOSTER. (See stipulation filed October 9, 1897.)

The final decree of October 28, 1897, says: "Now come the parties herein by their respective solicitors." This decree does not expressly name said co-defendants as such except in the title, but the Kansas City Stock-Yards Company is required by the decree to give a certain bond as a condition for staying the operation of the state law pending the appeal to this court. (See decree filed October 28, 1897; also, 82 Fed. 840.)

On October 20, 1897, after the court had decided adversely to the complainants, by vacating the restraining orders and refusing a temporary injunction, the clerk, at the request of the complainants' solicitors, entered a *pro confesso* in each case against the Kansas City Stock-Yards Company, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson; and on October 28, 1897, a formal decree *pro confesso* was entered against said defendants, but on the same day a judgment was rendered and a final

decree entered on the merits dismissing the bills. The following is a copy of said final decree, omitting the heading, which contains the title and number of each case:

"FINAL DECREE.

"Now come the parties herein, and by their respective solicitors, on this 28th day of October, 1897, and the foregoing causes having been heretofore, on the 20th day of October, 1897, duly heard and submitted upon the pleadings, proofs, stipulations of the parties, master's report, exceptions thereto, and the arguments of counsel thereon, and the same having been duly taken under advisement by the court and due deliberation having been had, it is ordered, adjudged and decreed that the said bills of complaint herein and each of them be and the same are hereby dismissed, with costs taxed in favor of the defendant, Louis C. Boyle, as attorney-general of the state of Kansas. To the end, however, that the existing status may be maintained, pending an appeal to the supreme court of the United States, it is further ordered, adjudged and decreed that the injunction which was heretofore granted in these causes, and each of them, be restored and continued in force for the term of ten days, and if in the meantime an appeal shall be taken, such injunction shall be continued in force until the appeal is heard and determined in the supreme court of the United States; provided, that in addition to the ordinary appeal bond, the Kansas City Stock-Yards Company shall make and file in this court its bond in the penal sum of two hundred thousand dollars, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock-yards in Kansas City, Kan., and Kansas City, Mo., which it may have exacted in violation of sections 4 and 5 of the Kansas statute relative to stock-yards, approved March 3, 1897, since an injunction was first awarded herein,

to wit, on the 13th day of March, 1897, and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of said appeal—said obligation to be void if the statute in question shall be pronounced invalid by the supreme court of the United States.

"It is further ordered that nothing herein contained shall impair any recourse which any party or parties may have on the bond for seventy-five thousand dollars heretofore given in this case, except to postpone claims made thereon until this case is finally determined on appeal, and that the stock-yards company shall hereafter give to shippers of cattle, or their agents, proper receipts for money paid for yarding, feeding, watering and weighing live stock, which shall show on their face the amounts exacted for such services, and the price charged for feed.

"The complainants, by their solicitors, duly excepted at the time in open court to the order and decree of said court dismissing said bills of complaint and each of them, and thereon in due form prayed for an appeal in each case, which said appeal is duly allowed, and the amount of the appeal bond to be given by the complainants with one or more sureties is fixed at $1,500. AMOS M. THAYER,

"OCTOBER 28, 1897. *U. S. Circuit Judge.*"

On November 23, 1897, the circuit judge granted an order enlarging the time to docket the consolidated case and file the record thereof with the clerk of this court, to which order the attorney-general consented. The body of said order and consent of the attorney-general reads as follows:

"For good cause shown, it is hereby ordered that the time in which the complainants shall docket the above case and file the record thereof with the clerk of the supreme court of the United States is enlarged by me for seventy days from and after the return-day fixed in said citation on appeal to the supreme court,

and the said complainants are hereby permitted to docket the above case and file the record thereof with the clerk of the supreme court of the United States by or before the period of seventy days from and after the date of the return-day of said citation.

"Dated NOVEMBER 23, 1897. AMOS M. THAYER,
United States Circuit Judge."

"I hereby consent to the granting and signing of said order. L. C. BOYLE,
"NOVEMBER 23, 1897. *Attorney-General.*"

The appeal taken by the complainants, Cotting and Higginson, runs against Louis C. Boyle, as attorney-general of the state of Kansas, only, and no citation has been issued against any other person as appellee.

II.—ARGUMENT.

1.—The Final Decree is Joint in Favor of all the Defendants.

The record does not show whether the decree *pro confesso* preceded or followed the final decree of dismissal on the merits. Both decrees are of the same date. We do not suppose it material which was prior in point of exact time. If the *pro confesso* was subsequent to the final decree of dismissal, of course it was unauthorized; if prior in point of time, it was superseded by the final decree. It is impossible to conceive of the act of the Kansas legislature being valid as to the attorney-general and void as to the Stock-Yards Company and its officers. The decree *pro confesso* is clearly unauthorized, for, if valid, then this state of affairs would exist: the Stock-Yards Company and its officers would be required to enforce the old rates in violation of the Kansas statute, while the attorney-general would be authorized by the final decree to prosecute for such violations of the act.

In Frow v. De La Vega, 15 Wall. 552, it was held that a final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others; and if the bill in such case be dismissed on the merits, it will be dismissed as to the

defendant in default as well as the others. Justice BRADLEY, delivering the opinion of the court, said:

"If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

After explaining the proper procedure, the learned justice says:

"But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal."

This case was cited with approval in Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 265.

In the original cases, the Stock-Yards Company and its officers, as well as the attorney-general, were treated as having assumed a hostile attitude to the complainant stockholders, and all the defendants were charged as joint wrong-doers in attempting to lower the rates in compliance with the Kansas statute. It was alleged that, notwithstanding the remonstrance of the complainant stockholders, the Stock-Yards Company and its officers had given notice that it would conform its rates to the statutory requirements. True,

it was alleged that the company and its officers did this through fear of criminal proceedings by the attorney-general; but the effect upon the revenues of the company, the vital question at issue, would be the same whether the Stock-Yards Company and its officers acted voluntarily or through fear in lowering the rates in accordance with the statute. A joint contemplated wrong was therefore charged against the Stock-Yards Company, its officers, and the attorney-general.

The final decree of dismissal was joint in its terms. It was not a dismissal as against the attorney general alone. Its reading is as follows:

"It is ordered, adjudged and decreed that the said bills of complaint herein and each of them be and the same are hereby dismissed, with costs taxed in favor of the defendant Louis C. Boyle, as attorney general of the state of Kansas."

This is surely a general dismissal of the bills as against all the defendants, though the costs are taxed in favor of the attorney-general alone. The decree *pro confesso* must be disregarded in any event. If the dismissal was not as to the Stock-Yards Company and its officers, then the causes are still pending and undetermined as to them, like the case cited from 15 Wall. We think, however, this court should treat the cases as finally disposed of as to all the defendants by the final dismissal of the bills October 28, 1897.

2.—Final Decree being Joint, all the Defendants Must be Parties to the Appeal.

It results from the foregoing that the final decree sought to be reviewed in this case was joint in favor of all the defendants; and, all being interested, each is a necessary party to a valid appeal. This is well settled by the authorities.

Elliott, in his work on Appellate Procedure, sections 138 and 140, states the doctrine, and says:

"Where the judgment is joint . . . all who are parties to the judgment must be made parties on appeal."

Under the head of "Parties to Proceedings in Error and Citation," Powell, in his work on Appellate Proceedings, pp. 272, 273, 274, says:

"SEC. 13. Proceedings in error must have their proper parties, and any defect is subject to objection as any original writ. No one can be plaintiff in error but he who is a party or privy to the record, and prejudiced by the final judgment. And all who were affected by the judgment either as plaintiffs or defendants, or their personal representatives, should join in the proceedings in error as parties thereto as they were joined in the judgment and interested for or against its reversion. A party co-defendant in the judgment who refuses to join in the proceedings in error should be summoned and served.

. . . . . .

"SEC. 14. When all the proper parties have not been joined as plaintiffs or defendants in error, the defendant may object to it, by doing so in due time by motion to dismiss or by a plea in abatement; for it is convenient and will tend to prevent multiplicity of suits and unnecessary labor, that all the parties inter-

ested in the judgment sought to be reversed should be brought before the court, so that the affirmance, reversal or modification of the judgment when made shall bind all the parties."

In Basket v. Hassell, 107 U. S. 602, 608, this court has declared that "an appeal will not be dismissed by reason of the omission of certain persons who were parties to the suit in the court below, if they have no interest in maintaining or reversing the decree." The converse of this proposition is also well established by the decisions of this court, though perhaps not in exact words. If the parties to the judgment of the court below have an interest either in maintaining or reversing the decree, they are necessary parties to an appeal. Most of the cases in this court involving this principle have arisen where there has been a joint judgment or decree against several defendants and part of them only have appealed. But we take it that the principle is the same where the plaintiff or complainant appeals — all those interested either in maintaining or reversing the decree or judgment are necessary parties to the appeal; and the same rule applies to writs of error.

In Williams v. Bank of the United States, 11 Wheat. 414, the judgment in the circuit court was joint upon a joint action against three defendants, and a writ of error was sued out by one of them in his own name only, without joining the others. The writ of error was dismissed on the ground that it ought to have been in the name of the three, but if the others should refuse to join in it, then it would deserve consideration whether the plaintiff might not have summons

and severance. The opinion was delivered by Chief Justice MARSHALL.

In Owings *et al.* v. Kincannon, 7 Pet. 399, a joint decree against six defendants was appealed from by two of them only. A motion to dismiss this appeal was sustained on the ground that all the defendants should have joined in it; Chief Justice MARSHALL delivering the opinion of the court. After citing the case of Williams v. Bank of the United States, *supra*, he says:

"By the judicial act of 1789, decrees in chancery pronounced in the circuit court could be brought before this court only by writ of error. The appeal was given by the act of 1803. The act declares 'that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error.' . . . The language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error."

In Deneale v. Stump's Executors, 8 Pet. 526, a writ of error in the name of Mary Deneale "and others" was dismissed. The court, through Chief Justice MARSHALL, says:

"Mary Deneale cannot alone maintain a writ of error on this judgment, but all the parties must be joined and their names set forth, in order that the court may proceed to give a proper judgment on the case."

In Heirs of Wilson v. Insurance Company, 12 Pet. 140, the writ of error named the plaintiffs only as "the heirs of Nicholas Wilson," and all the defendants in the court below did not join in the writ, and it was held bad on both grounds and was dismissed.

Chief Justice TANEY, delivering the opinion of the court, cites the two foregoing cases from 7 Pet. and 8 Pet., respectively, and then proceeds as follows:

"In both of the cases referred to, it appears that the motions to dismiss were not made at the first term, or at the time of appearance in this court, but each of the cases had been depending here two years before the motion was made. The rule of this court therefore is, that where there is a substantial defect in the appeal or writ of error, the objection may be taken at any time before judgment, on the ground that the case is not legally before us, and that we have not jurisdiction to try it. It follows that the writ of error in the case under consideration must be dismissed."

In Smyth v. Strader *et al.*, 12 How. 327, the decision of the court is as follows:

"It appearing to the court here that this writ of error is vicious and defective, inasmuch as it does not set out the names of all the parties to the judgment of the circuit court, it is thereupon, on the motion of Mr. Pryor, of counsel for the defendants in error, now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, with costs."

In *Ex parte* Mussina *et al.*, 20 How. 280, it was held that, where a part of the persons against whom a decree has been rendered have appealed, the others cannot take an appeal—the first appeal should in such case be dismissed as irregular, and a new appeal taken in which all should join; if all will not, summons and severance. Justice MCLEAN delivered the opinion of the court.

In Masterson v. Herndon, 10 Wall. 416, it is distinctly ruled that all the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal or it will be dismissed, except suffi-

cient cause for the misjoinder be shown. Justice MILLER discusses in the opinion the old practice of summons and severance, which he says has "fallen into disuse in modern practice," but that the supreme court will give the same effect to the allowance of a writ of error or an appeal when the record shows that one of the parties has been notified or requested in writing to join in the writ of error or appeal, and refuses to do so. The appeal was dismissed.

In Miller v. McKenzie, 10 Wall. 582, the suit was commenced by Miller against McKenzie, James Hamer, Joseph Hamer and Wall to recover the value of several bales of cotton. Judgment was rendered for the defendants, whereupon the plaintiff prosecuted his writ of error. The defendants moved to dismiss the case for want of jurisdiction. The opinion of the court, delivered by Justice NELSON, is as follows:

"It appears from an inspection of the record that the writ of error is defective in respect to the parties. It is therein recited that the proceedings are between Pitzer Miller and Larkin McKenzie *and others*. This defect has been held so many times in this court as fatal to its jurisdiction, that it need be but mentioned to require a dismissal of the case. Motion granted."

In The Protector, 11 Wall. 82, the appeal was dismissed because taken in the name of William A. Freeborn & Co., the court holding that no difference existed between writs of error and appeals as to the manner in which the names of the parties should be set forth.

Justice NELSON, delivering the opinion of the court, says:

"The motion made by the appellees to dismiss the case from the docket for want of jurisdiction is grounded upon a defect of the title of the parties in the appeal as allowed. The title is 'William A. Freeborn & Co. v. The Ship Protector and Owners.' This defect in a writ of error has been held fatal to the jurisdiction of the court since the case of Deneale *et al.* v. Stump's Executors down to the present time, nor can the writ be amended according to the repeated decisions of this court."

The learned justice then reviews the acts of congress governing the practice and the decisions under them, and shows that in respect to the joinder of parties there is no difference between a writ of error and an appeal in equity or in admiralty.

Justices SWAYNE and BRADLEY were of opinion that the defect was amendable, and they dissented on that ground only. As the names of all three of the libelants constituting the firm of Wm. A. Freeborn & Co. appeared in the record, the defect would now be amendable under the act of June 1, 1872 (Revised Statutes, § 1005). Estes v. Trabue, 128 U. S. 225, *post.*

In Hampton v. Rouse, 13 Wall. 187, there was a motion to dismiss the writ of error from a judgment in ejectment against Wade Hampton and two other defendants. All the defendants tendered the bill of exceptions, but the writ of error was prosecuted by Wade Hampton only, and there was no summons and severance or other equivalent proceeding. Chief Justice CHASE delivered the following opinion of the court, namely:

"It has often been held that in a writ of error to a joint judgment against several, all must join, and that the omission of one or more without such proceeding is an irregularity for which the writ will be dismissed. The motion in the present case must therefore be granted."

Simpson v. Greeley, 20 Wall. 152, was originally an action of ejectment, for rents and profits and for waste, commenced in the district court of Leavenworth county, Kansas, by C. S. Greeley and seven others against William A. Simpson and eight others, who were his tenants; judgment for the plaintiffs against the defendants for possession of the lands, and against defendant Simpson for $4300 for rents, issues, profits, and waste, and against the other defendants for $2600, to be credited as part of said $4300 if collected. Simpson carried the case to the supreme court of Kansas, alleging that he could not obtain the assent of any of his co-defendants to join him in the proceedings. Afterwards, however, they did file a petition in error similar to that of Simpson. The court affirmed the judgment, when Simpson alone applied for a writ of error under the twenty-fifth section of the judiciary act. 8 Kan. 587, 589, 601; 20 Wall. 153.

The writ of error was dismissed by the supreme court of the United States for want of jurisdiction, in accordance with the well-established doctrine of the court, that all the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dismissed, except sufficient cause for the non-joinder be shown. Justice CLIFFORD, anouncing the unanimous decision of the

court, reviews the cases and then states the rule, as follows:

"Where the interest is joint and the interest of all is affected by the judgment, the rule is universal that all must join in the writ of error, else it is open to the other party to demand that it be dismissed, unless a severance of the parties in interest has been effected by summons and severance, or by some equivalent action appearing in the record."

The opinion in Feibelman v. Packard *et al.*, 108 U. S. 114, delivered by Chief Justice WAITE, reads as follows:

"Moses Feibelman and George Voelker, as partners, sued the defendants in error to recover damages for the seizure of their partnership goods by Packard, marshal of the United States for the district of Louisiana. A judgment was rendered against them. Their interests in the suits were joint, and the judgment affects them jointly and not separately. Feibelman alone has brought this writ of error, and there has been no summons and severance, or other equivalent proceedings. It follows that the writ must be dismissed on the authority of Williams v. Bank of the United States, 11 Wheat. 414; Masterson v. Herndon, 10 Wall. 416; Simpson v. Greeley, 20 Wall. 152, and it is so ordered."

In Hilton v. Dickinson, 108 U. S. 165, 168, this court said, through Chief Justice WAITE, that "if, on looking into the record, we find we have no jurisdiction, it is our duty to dismiss on own motion without awaiting the action of the parties." And this principle was reaffirmed in Estes v. Trabue, 128 U. S. 225, 226, where the court further decides, that

"Where the judgment below is a money judgment against the claimants and their two sureties in a bond, naming them jointly, and the sureties do not join in a writ of error, and there is no proper summons and

severance, the defect is a substantial one, which this court cannot amend, and by reason of which it has no jurisdiction to try the case, and it will of its own motion, dismiss the case, without awaiting the action of a party."

And this case arose long after the taking effect of the act of congress of June 1, 1872, allowing the amendment of writs of error in certain cases, and now published as section 1005 of the Revised Statutes.

In Shannon v. Cavazos, 131 U. S., App. LXXI, where one of the several codefendants appealed from a joint decree against all, without summons and severance, the case was dismissed.

In Downing v. McCartney, 131 U. S., App. XCVIII, an appeal by one of three complainants from a joint decree without notice to the others, and without their refusing to join in it, was dismissed.

The syllabus in Mason v. United States, 136 U. S. 581, reads as follows:

"A postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties appeared and defended; the suit was abated as to one of the sureties who had died, and the other sureties made default, and judgment of default was entered against them. On the trial a verdict was returned for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who had appeared sued out a writ of error to this judgment without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as plaintiffs in error, or for a severance of those parties. *Held*, the motion must be denied."

Hardee v. Wilson, 146 U. S. 170, decides that where an appeal is brought by one of several joint defendants

without a summons and severance or equivalent proceedings, the appeal will be dismissed. Justice SHIRAS, delivering the opinion of the court, reviews the authorities, and fully explains the former procedure of summons and severance, as also the modern practice on this subject.

In Nash v. Harshman, 149 U. S. 263, an appeal by the mortgagor alone from a decree of foreclosure against him and his subsequent grantee and other defendants, leaving the case pending in the court below against the other defendants, was dismissed on the authority of Hohorst v. Hamburg-American Packet Co., *supra*.

In Hedges v. Seibert Cylinder Oil Cup Co., 50 Fed. Rep. 643, the circuit court of appeals for the third circuit recognized the same rule, and it was accordingly held that all the parties against whom a joint judgment or decree was rendered must unite in a writ of error or appeal therefrom, and where the writ of error is sued out or the appeal taken by only one of such parties it will be dismissed, unless there has been a summons and severance or some like proceeding, or sufficient cause is shown for the non-joinder of the other parties. The solicitor for appellant contended that the decree was joint and several, and that, where the decree on its face shows a severance or a separateness, any one of the parties may appeal in respect of his several or separate interest, this being equivalent to summons and severance; but the court did not so regard it.

Scores of decisions of the state courts might be

cited fully sustaining the doctrine announced by Elliott and Powell in their text-books upon Appellate Procedure, as cited at the beginning of this subdivision of our brief, that "all the parties interested in the judgment sought to be reversed, should be brought before the court, so that the affirmance, reversal or modification of the judgment when made shall bind all the parties."

The supreme court of Kansas has many times asserted the rule to be that the absence of a party to a judgment who will be affected by a modification or reversal is sufficient to defeat the jurisdiction of the court, and there can be no review of any part of the judgment.

McPherson v. Storch, 49 Kan. 313, 321, and cases cited.

Investment Co. v. National Bank, 56 id. 49.

See also—

Smetters v. Rainey, 14 Ohio St. 287.

Carter v. Atkinson, 29 Neb. 612, 622.

Handerlock v. Dundee, M. & T. I. Co., 88 Ind. 139, 141.

Concannon v. Noble, 96 id. 326.

It cannot be claimed that the Kansas City Stock-Yards Company has no interest either in maintaining or reversing the final decree dismissing the bills of complaint. Whether it should have been an appellant or an appellee makes no difference now, for it is neither the one nor the other. Yet it is the principal party in interest. By the bills, it appears that Cotting owned

250 shares and Higginson 296 shares of the stock of the company, being in all of a par value of $54,600, while the capital stock outstanding was alleged to be $7,368,650. The complainants together, therefore, owned only one one-hundred-and-thirty-fifth part of the stock of the company. If the complainants were injured by the operation of the Kansas law, the Kansas City Stock-Yards Company was injured one hundred and thirty-five times more. It certainly ought to have been made a party to the appeal, so that it might have protected its interests, whether those interests were with the attorney-general or with the complainants. Although the complainants, who are now appellants, placed the Stock-Yards Company in a hostile attitude and ranged it with the attorney-general as a defendant, there is ground for suspicion that the company sympathized with the complainants, for it gave a bond in the sum of $200,000 for the purpose of staying the operation of the law pending the appeal. But on whatever side its interest may be, it should have been made a party to the appeal, so that it might protect those interests; and any party to the decree may make such an objection as this, for it is jurisdictional.

We have caused enough of the record to be printed to accompany this brief to enable the court to act understandingly upon this motion without referring to the original record.

We call especial attention to the facts that the appeal bond runs to the attorney-general alone, and the citation is issued against him only, and while the

bond for $200,000 and the assignments of error recite the names of all the parties below in the title, yet the indorsements show that the appeal was intended to be taken against the attorney-general and no one else.

We therefore respectfully ask that our motion be sustained, and that the appeal be dismissed for want of necessary parties.

L. C. BOYLE,
Attorney-General of the State of Kansas,
Appellee.

DAVID MARTIN,
Of Counsel.

TOPEKA, KAN., November 26, 1898.

No. 237 A 3

FILED
JAN 14 1899
JAMES H

Brief of Martin & Boyle for

SUPREME COURT OF THE UNITED ST

OCTOBER TERM, 1898.

Filed Jan. 14, 1899.

No. 237.

CHARLES U. COTTING, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.

Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

FRANCIS L. HIGGINSON, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.

Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

CAUSES CONSOLIDATED.
No. 7427.
No. 7453.
In U. S. C. C., District of Kansas, First Division.

MOTION TO ABATE SUIT, AND BRIEF IN SU
SAME. ALSO, AFFIDAVIT OF L. C. BO

DAVID MARTIN.
L. C. BOYLE.

In the Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.
Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

FRANCIS L. HIGGINSON, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.
Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

CAUSES CONSOLIDATED.
No. 7427.
No. 7453.
In U. S. C. C., District of Kansas, First Division.

NOTICE.

To Charles U. Cotting and Francis Lee Higginson, Appellants, and their Counsel and Solicitors, Albert H. Horton and B. P. Waggener:

Please take notice that on Monday, February 6, 1899, at Washington, D. C., at the opening of the court, or as soon thereafter as counsel can be heard, a motion will be submitted, for decision, to the supreme court of the United States, by the appellee, Louis C. Boyle, sued as attorney-general of the state of of Kansas, for the abatement as to him of the said consolidated suit, and that the cause be stricken from the docket of said court as to him, without revivor or continuance against any person in the place or stead of said appellee, by substitution or otherwise.

Annexed hereto is a copy of said motion, a copy of the affidavit of Louis C. Boyle, and a copy of the brief in support of said motion.

LOUIS C. BOYLE,
Sued as Attorney-General of the State of Kansas.

By DAVID MARTIN, his Solicitor.

In the Supreme Court of the United States.

No. 237 of October Term, 1898.

CHALES U. COTTING, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.
Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

FRANCIS L. HIGGINGSON, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.
Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

CAUSES CONSOLIDATED.
No. 7427.
No. 7453.
In U. S. C. C., District of Kansas, First Division.

NOTICE.

To the Kansas City Stock Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, and Wallace Pratt, Israel P. Dana and —— Black, their counsel and solicitors in the court below:

Please take notice that on Monday, February 6, 1899, at Washington, D. C., at the opening of the court, or as soon thereafter as counsel can be heard, a motion will be submitted for decision to the supreme court of the United States, by the appellee, Louis C. Boyle, sued as attorney-general of the state of Kansas, for the abatement, as to him, of the said consolidated suit, and that the cause be stricken from the docket of said court as to him, without revivor or continuance against any person in the place or stead of said appellee, by substitution or otherwise.

Annexed hereto is a copy of said motion, a copy of the affidavit of Louis C. Boyle, and a copy of the brief in support of said motion.

LOUIS C. BOYLE,
Sued as Attorney-General of the State of Kansas.

By DAVID MARTIN, his Solicitor.

In the Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant*,

vs.

LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.

Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

FRANCIS L. HIGGINSON, *Appellant*,

vs.

LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.

Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

CAUSES CONSOLIDATED.
No. 7427.
No. 7453.
In U. S. C. C., District of Kansas, First Division.

MOTION FOR ABATEMENT OF SUIT.

And now comes said Louis C. Boyle, appellee, impleaded as a defendant in the court below as attorney-general of the state of Kansas with the Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust and Elliott E. Richardson, defendants, at the suits of Charles U. Cotting and Francis Lee Higginson, respectively, complainants in the court below, and appellants in this court, and moves the court for the abatement as to him of this consolidated suit in this court, and that the cause be stricken from the docket of this court as to him, without revivor or continuance against any person in the place or stead of this appellee, by substitution or otherwise, and as grounds for this motion the said Louis C. Boyle, appellee, avers as follows:

1. He is not now the attorney-general of the state of Kansas, having retired from that office by reason of the expiration of his

official term, on the second Monday, being the 9th day of January, A. D. 1899.

2. Hon. A. A. Godard was duly elected to said office of attorney-general of the state of Kansas at the regular November election, 1898, and, on the 9th day of January, 1899, the said Hon. A. A. Godard duly qualified and was inaugurated as attorney-general of the state of Kansas, and the said Hon. A. A. Godard has ever since been, and now is the duly qualified and acting attorney-general of the state of Kansas.

3. There is no authority of law for a revivor or continuance by this court of a litigation of the nature of this consolidated suit against the person or the officer who becomes the successor in office of the original appellee.

4. The allegations of the bills of complaint do not in any way affect or concern the said A. A. Godard, either personally or officially.

5. No relief is prayed in said bills against any successor in office of this appellee as attorney-general of the state of Kansas.

6. The said A. A. Godard has no personal or official interest in the decree for the dismissal of the bills of complaint, or in the affirmance or reversal thereof.

7. The said A. A. Godard has no personal or official interest in the decree and judgment in favor of this appellee for costs or in the affirmance or reversal of said decree and judgment.

8. Where, as in this case, suit is brought in a United States court, against a defendant occupying a high office in the executive department of a state, and he is charged with committing wrongs under color of his office, by attempting or threatening to enforce an act of the legislature alleged to be void because in conflict with the constitution of the United States, and, after an appeal to this court, and pending such appeal, his term of office expires and he legally goes out of office, there is an abatement of such suit, and it cannot be revived or continued against the successor in office of such original defendant, either with or without the consent of such successor.

9. The only source of jurisdiction of the United States courts in these causes against this appellee, and claimed by the appellants to take the same out of the prohibition of the eleventh amendment to the constitution of the United States, was and is, although this appellee was holding the office of attorney

1411

general of the state of Kansas, yet he was acting and threatening to act under the alleged authority of a legislative act in contravention of the constitution of the United States and certain amendments thereto and of certain acts of congress, and that by reason of the premises this appellee did not officially represent the state of Kansas, but was wrongfully acting in his own behalf, and not as the official representative of said state.

10. An order of revivor or substitution could be made against the said A. A. Godard only upon the assumption that he does not officially represent the state of Kansas in this litigation, and on that assumption the said A. A. Godard is not the legal successor in office of this appellee as to this consolidated suit.

LOUIS C. BOYLE,
Sued as Attorney-General of the State of Kansas.

By DAVID MARTIN, his Solicitor.

In the Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant.* *vs.* LOUIS C. BOYLE, etc., *Appellee.*	CAUSES CONSOLIDATED. No. 7427. No. 7453.
FRANCIS LEE HIGGINSON, *Appellant.* *vs.* LOUIS C. BOYLE, etc., *Appellee.*	In U. S. C. C., District of Kansas, First Division.

AFFIDAVIT OF LOUIS C. BOYLE.

The United States of America,
State and District of Kansas, County of Shawnee, } ss.

Louis C. Boyle, of lawful age, being duly sworn, deposeth and saith: That he is the appellee above named; that, at the regular November election in the state of Kansas in the year 1896, he was duly elected to the office of attorney-general of the state of Kansas for the term of two years and until his successor should be elected and qualified, said term to commence on the second Monday of January, A. D. 1897; that he duly qualified and was duly inaugurated as such attorney-general on the second Monday of January, 1897, and he acted as such attorney-general continuously from that time forth until the second Monday of January, A. D. 1899.

Affiant further says, that at the regular November election in the state of Kansas in the year 1898, Hon. A. A. Godard was duly elected to said office of attorney-general of the state of Kansas for the term of two years and until his successor shall be elected and qualified, said term commencing on the second Monday of January, A. D. 1899; that the said A. A. Godard duly qualified and was duly inaugurated as such attorney-general on said second Monday, being the 9th day, of January, A. D. 1899, and immediately thereafter entered upon the duties of said office, and ever since said time the said A. A. Godard has been and he now is the duly qualified and acting attorney-general of the state of Kansas.

Affiant further says, that he is not now the attorney-general

of the state of Kansas, either *de jure* or *de facto*, but Hon. A. A. Godard is the attorney-general of the state of Kansas *de jure*, and is duly acting as such officer.

[SIGNED] LOUIS C. BOYLE.

Subscribed and sworn to before me by the said Louis C. Boyle, this 10th day of January, 1899. GEO. F. SHARITT, *Clerk*.

[SEAL.] By F. H. HOLT, *Deputy*.

In the Supreme Court of the United States.

No. 237 of October Term, 1898.

CHARLES U. COTTING, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.
Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

FRANCIS L. HIGGINSON, *Appellant*,
vs.
LOUIS C. BOYLE, as Attorney-General of the State of Kansas, *Appellee*.
Also, The Kansas City Stock-Yards Company, a corporation, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson, impleaded with said Louis C. Boyle, as Attorney-General of the State of Kansas, as defendants in the court below.

CAUSES CONSOLIDATED.
No. 7427.
No. 7453.
In U. S. C. C., District of Kansas, First Division.

BRIEF OF LOUIS C. BOYLE, SUED AS ATTORNEY GENERAL, ETC., IN SUPPORT OF MOTION FOR ABATEMENT OF SUIT.

I.—STATEMENT.

On December 19, 1898, a motion was submitted by us for the dismissal of this appeal for want of necessary parties. We then caused enough of the transcript of the record to be printed to enable the court to act understandingly upon that motion without referring to the original record. The extracts then printed are ample for all purposes of the present motion, when taken in connection with the affidavit of Louis C. Boyle, a printed copy of which accompanies the motion. Whether the Kansas City Stock-Yards Company and its officers who were made parties defendant in the court below were or are parties to

the appeal, is immaterial in the consideration of this motion, but we have given due notice to their counsel.

It was charged, in substance, in the bills, that the Kansas legislature of 1897 had enacted a bill for the purpose of regulating the charges of the proprietors of public stock yards, which, if put into operation, would materially reduce the revenues of the Kansas City Stock-Yards Company, a Kansas corporation whose yards are bisected by the boundary line between the states of Kansas and Missouri, but lying principally in this state; that said act contravenes certain provisions of the constitution of the United States and the amendments thereto, and certain acts of congress, and therefore was and is null and void. The following is a quotation from the fourth paragraph of each of the bills, namely:

"That the said so-called act is now by the said defendant, Louis C. Boyle, as attorney-general of the state of Kansas, alleged to be in full force, virtue and effect as a valid law of the state of Kansas, the said so-called act providing among other things that 'it shall be the duty of the attorney-general to prosecute all violations of the provisions thereof.'" Extracts, pp. 8, 31.

The following is a copy of paragraph 12 of each of the bills:

"That by said section 8 of said so-called act, referred to as 'Exhibit A,' it is made the duty of the said Louis C. Boyle, as attorney-general of the state of Kansas, to prosecute all of the violations of the provisions of said act; that your orator fears that the said attorney-general may cause the defendant corporation, and any and all of its officers and agents who shall violate any of its provisions, to be arrested and prosecuted; that he will attempt to enforce said so-called act through the courts of Wyandotte county, Kansas, and through the courts of the state of Kansas, by a multiplicity of criminal actions or proceedings against each and every person failing or refusing to comply with the provisions thereof, including the said defendant corporation and its officers and agents, thereby greatly harassing and annoying the said defendant corporation and its officers and agents and causing them great expense and consuming valuable time, unless the said defendant corporation, its officers and agents, shall put in force at once the said charges and prices specified in said sections 4 and 5 of said so-called act and shall obey and carry out all of the terms and provisions of said act and each section thereof. And your orator fears that the said Louis C. Boyle, as attorney-general, will proceed at once to carry into force said arrests and prosecutions unless immediately

restrained by the order and injunction of this honorable court." Extracts, pp. 14, 15, 38.

There are other allegations to the effect that said Louis C. Boyle, as attorney-general of the state of Kansas, had threatened to enforce the provisions of said act, and that the officers of the stock-yards company were so in fear of prosecutions by him that they had notified the complainants, who were stockholders in said stock-yards company, that said officers would put into force and effect the rates prescribed by said act, and had ordered accordingly. The relief demanded in each case was the same. We quote the essential part of the prayer in the Higginson case, as follows:

"Therefore your orator prays that the decree of this honorable court, adjudging that it is the duty of the said defendant corporation and the said Charles F. Morse, acting president, general manager and sole managing director of said defendant corporation, for the benefit of said corporation and of your orator and the other stockholders of said corporation, to revoke at once the orders and directions to put in force the provisions of said so-called act, referred to herein as 'Exhibit A,' and the maximum charges and prices therein specified, and that it is the duty of said defendant corporation and the said Charles F. Morse, acting president, general manager and sole managing director, for the pecuniary benefit of your orator and the other stockholders of said defendant corporation, to maintain and operate the stock-yards of said defendant corporation herein named in the same manner as they have been heretofore economically and successfully operated, and to charge for the services to be furnished, for yardage and other matters, the present existing charges (which are fair, reasonable, and just); and also to sell and deliver hay, corn and other grain to stock-raisers, shippers and other persons upon the same terms and for the same prices and in the same way such articles are now sold by said defendant corporation (which said prices, under all the circumstances and conditions, are fair, reasonable, and just); and that said defendant corporation, and each of its said officers and agents named as defendants herein, shall be enjoined from obeying, observing or putting into force any of the provisions of said so-called act; and that said order and injunction issue against said defendant corporation and the said Charles F. Morse, as acting president and sole managing director thereof, and each of the other officers and agents of said defendant corporation, made parties defendant herein, commanding them and each of them to refrain from putting into force the provisions of the said so-called act or any part thereof.

"That the said Louis C. Boyle, as attorney-general, be adjudged and decreed from attempting, as against said defendant corporation or any of its officers, agents, servants, or employees, to enforce the provisions of the said so-called act or any part thereof. And also, that said order and injunction issue against the said Louis C. Boyle, as attorney-general, commanding him to refrain from harassing and annoying, by prosecution or otherwise, under the provisions of the said so-called act, the defendant corporation, the said Charles F. Morse, or any of the other officers, servants, agents or employees of the said defendant corporation herein named.

"That the final mandatory order and injunction of this court in this case issue, compelling said defendant corporation, and the said Charles F. Morse, and each of the other officers and agents of said defendant corporation herein named, to operate and maintain the said stock-yards of the said defendant corporation in the state of Kansas as they are now operated and maintained, and that they exact and collect the same charges for services performed and the same prices now demanded and received, wholly disregarding the said so-called act and all of the provisions thereof.

"That a final order, judgment and decree issue that the said so-called act, approved March 3, 1897, herein referred to as 'Exhibit A' and made a part of this bill of complaint, is unconstitutional and void and of no validity, force or effect whatever; and that all of said defendants and each of them be enjoined from enforcing or attempting to enforce the said so-called act or any of the provisions thereof.

"That a preliminary injunction may issue at once, upon the filing of this bill of complaint, against the said defendant corporation and each of its officers and agents named as defendants herein, during the pendency of this suit, strictly commanding and enjoining the said defendants, and each of them, under the pains and penalties which may fall upon them and each of them in case of disobedience, that they forthwith and until the further order, judgment and decree of this court, desist from putting into force the said maximum rates, charges and prices specified in said so-called act aforesaid; and against the said Louis C. Boyle, as attorney general, commanding and enjoining him to desist from enforcing or attempting to enforce the said so-called act against said defendant corporation and its officers and agents named as defendants herein, by arrest or otherwise, through the courts of the state or otherwise."

The following is an extract from the final decree:

"Now come the parties herein, and by their respective solicitors, on this 28th day of October, 1897, and the foregoing causes having been heretofore, on the 20th day of October, 1897, duly

heard and submitted upon the pleadings, proofs, stipulations of the parties, master's report, exceptions thereto, and the arguments of counsel thereon, and the same having been duly taken under advisement by the court and due deliberation having been had, it is ordered, adjudged and decreed that the said bills of complaint herein, and each of them, be and the same are hereby dismissed, with costs taxed in favor of the defendant, Louis C. Boyle, as attorney-general of the state of Kansas." Extracts, pp. 56, 57.

There was no prayer in either of the bills against the successor or successors of Louis C. Boyle, as attorney-general of the state of Kansas; indeed, the cause of complaint against the attorney-general was entirely personal to the said Louis C. Boyle. The allegations cannot be applied to A. A. Godard, the present attorney-general. For aught we know, he concurs in opinion with counsel on the other side, that the Kansas act is unconstitutional, and may agree that the final decree of the circuit court ought to be reversed and the legislative act treated as a dead letter. Certainly he can have no personal or official interest in the affirmance or reversal of the judgment in favor of this appellee for costs—a very large sum.

The affidavit of Louis C. Boyle following the motion shows that he is no longer the attorney-general of the state of Kansas, because his official term expired January 9, 1899 and A. A. Godard then became attorney-general.

II.—ARGUMENT.

The original jurisdiction of this court is quite limited, and its appellate power is circumscribed. The second paragraph of section 2 of article 3 of the constitution reads as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exeptions and under such regulations as the congress shall make."

Article 11 of amendments to the constitution operates as a limitation upon the jurisdiction of all the federal courts. It is thereby declared that "the judicial power of the United States shall not be construed to extend to any suit in law or equity

commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

At the outset of these suits, we claimed that they were virtually against the state through the attorney-general, and that they could not be maintained because within the prohibition of the eleventh amendment. But we were met on this ground in the first paragraph of the opinion of the court, by Judge FOSTER, as follows:

"There has been some discussion about the jurisdiction of this court, but it is not seriously challenged; and the objection by the attorney-general that he is improperly made a party defendant is not well taken, as the court has jurisdiction to enjoin a state officer from enforcing an unconstitutional law. Reagan v. Trust Co., 154 U. S. 388."

Turning to the authority cited, we find that Mr. Justice BREWER has classified the cases where it has been held that suits were without or within the prohibition of the eleventh amendment. Most of the cases without the prohibition have been those where a state officer has acted under claim of authority derived from a legislative act alleged to be in contravention of the federal constitution. In such cases, for the purposes of the litigation, the defendant is stripped of his official character, and he is charged, as in this case, with an intent to violate the plaintiff's rights; of course, he cannot protect himself by an unconstitutional statute, and being a mere personal wrong-doer, he can have no successor as such. If it be admitted that the officer is the representative of the state in such case, then it must be dismissed for want of jurisdiction.

The subject of revivor or continuance of a surviving suit in the event of *the death* of a party seems now to be well provided for by an act of congress and duly authorized rules of court. Section 31 of the judiciary act of 1789 (1 U. S. Stat. at Large, 90) was as follows:

"SEC. 31. That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such

cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator who shall become a party as aforesaid shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of the said court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

In the revision of 1873 this section is divided, and now appears as sections 955 and 956, Revised Statutes.

In Green v. Watkins, 6 Wheat. 260, decided at February term, 1821, the defendant in error, in an action respecting realty, moved to dismiss the writ of error upon the suggestion of the death of the demandant and plaintiff in error, pending the proceedings in this court. Justice STORY, delivering the opinion of the court, referred to the distinction between the death of parties before and after judgment and while a writ of error is depending, and said:

"In the former case, all personal actions by the common law abate; and it required the aid of some statute like that of the thirty-first section of the judiciary act of 1789, C. 20, to enable the action to be prosecuted by or against the personal representative of the deceased when the cause of action survived. In real actions the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up, and the plea is not therefore in the same condition as it was in the lifetime of the party. But in cases of writs of error upon judgment already rendered a different rule prevails," etc.

The opinion concludes as follows:

"In respect to real actions, this is the first time the question has presented itself upon a writ of error, where the death of

either party has occurred *pendente lite*. There is no doubt that the heir or privy in estate who is injured by an erroneous judgment may prosecute a writ of error to reverse it. And there seems no good reason why, in case of the death of his ancestor pending proceedings, he may be not be admitted to become a party, or be cited to become a party, to pursue or defend the writ, in the same manner as in personal actions. The death of neither party produces any change in the condition of the cause, or in the rights of the parties. It would seem reasonable, therefore, that the suit should proceed, and not be dismissed or abated. In the absence of all authority which binds the court to a different course, we are disposed to adopt this doctrine, and shall promulgate a general rule on the subject."

Accordingly, at the same term, this court adopted a rule, published as No. 31, in 6 Wheaton, as follows:

"Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives of the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed, if it be erroneous; provided, however, that a copy of every such order shall be printed in some newspaper at the seat of government in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the term of the supreme court then next ensuing."

This is still in force as the first paragraph of rule 15, except as to the place of publication of a copy of the order.

In Packer's Heirs v. Thomas, 7 Wheat. 530, the suit was brought against Macker for an undivided moiety of a certain tract of land. After service of summons, Macker died without appearance. A rule was obtained by the plaintiff below upon the heirs of Macker to show cause why the suit should not be revived against them. This rule was served, but no cause being shown to the contrary, an order of revivor was taken, and at a subsequent term judgment by default was rendered against the

heirs, from which judgment a writ of error was prosecuted. The court, through Justice WASHINGTON, delivering its opinion, said:

"The main question for the decision of this court is, whether the circuit court erred in directing the suit to be revived against the heirs of Macker, and rendering judgment against them? The court consider this point to have been decided in the case of Green v. Watkins, 6 Wheat. 260. The question there was, whether, in real actions, the death of either party, after a writ of error sued out, abates the suit; and it was decided that it did not. But in examining the general principles of law upon the subject of abatement by the death of parties, it was distinctly laid down that, in real and personal actions, the death of either party before judgment did, at common law, abate the suit; and that the thirty-first section of the judiciary act of 1789, chapter 20, was necessary to enable the action to be prosecuted by or against the representatives of the deceased party, when the cause of action survived. But this section is clearly confined to personal actions, as the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee."

The closing sentence of the opinion is as follows:

"The error in this case was in ordering the suit to be revived and prosecuted against the heirs of the original defendant, and proceeding to render judgment against them upon a summons and count against the original defendant, all which sufficiently appears upon the face of this record."

And the suit was accordingly abated.

In the new work of Garland and Ralston on Federal Practice, vol. 1, § 196, they say:

"SEC. 196. Previous to the act of March 3, 1875, there was no adequate remedy, by the representatives of deceased persons, by writ of error or appeal, where the deceased was a party to a final judgment or decree rendered in a circuit court, and died before the two years allowed for taking an appeal or bringing a writ of error had expired. But the ninth section of that act provides in such cases as follows: 'That whenever either party to a final judgment or decree, which has been or may be rendered in any circuit court, has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive said suit by any formal proceeding aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon

may enter an appearance or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree was rendered has died before appeal taken or writ of error brought, notice to his representative shall be given from the supreme court, as provided in case of death of a party after appeal taken or writ of error brought.'"

There is no congressional legislation, however, authorizing this court to revive or continue in force an appeal or writ of error against a successor in office of the original defendant, whether a state or a national officer, and this court cannot bring in such a new party without additional legislation.

In The Secretary v. McGarrahan, 9 Wall. 298, the suit was brought against the secretary of the interior, Hon. O. H. Browning, to compel him by mandamus to issue to McGarrahan a patent for certain lands. The writ of mandamus was directed to the secretary or to his successor in office. Four months before the decision of the court was announced, Hon. O. H. Browning resigned his office, and was succeeded by Hon. J. D. Cox. On page 313 the court says:

"Service was made upon O. H. Browning, secretary of the interior; but the fact is conceded, or not denied, that he had resigned and gone out of office four months before the decision of the court was announced. When he resigned of course the suit abated, but the court gave judgment against him as if he were still in office, and decreed that the writ of mandamus should be directed to him and to his successor in the office. Complaint may well be made by that party, that he no longer possessed the power to execute the commands of the writ, and the present secretary may well complain that he is adjudged to be in default though he never refused to allow the relator to purchase the land, and that the judgment was rendered against him without notice and without any opportunity to be heard."

It will be observed that the court holds that upon the resignation of Browning the suit abated, and that he (Browning) might well complain that he no longer possessed the power to execute the commands of the writ. It may be urged, in the case at bar, that L. C. Boyle, one of the defendants, has no further standing in this court to make this, or any other motion in the present or future progress of this case; that in the event an attempt was made to revive this suit in the name of A. A. Godard, the present attorney-general, he (Godard) might properly invoke the principle as announced in The Secretary

v. McGarrahan, *supra*. Yet, as has already been noted, the supreme court has expressly declared that a party standing in a similar relation to that of L. C. Boyle might call the court's attention to the status of the case, whereupon the suit would abate. On principle, no other conclusion could be reached.

The purpose of the suits brought by Cotting and Higginson against said L. C. Boyle was to restrain the said Boyle from attempting to enforce what is alleged by plaintiffs to be an unconstitutional law. Plaintiffs, in their pleadings, as well as in briefs, repeatedly disavowed any intention of attempting to restrain the state of Kansas from doing anything, but assert that their action is leveled against L. C. Boyle, who, under the color of his office, is attempting to do certain unlawful things, injuriously affecting the rights of plaintiffs. Thus it will be seen that the restraining order sued out against the said Boyle ran against him personally, and in no way could affect the office of attorney-general of the state of Kansas. It must be borne in mind that the claim is made that the said Boyle was attempting, by reason of his official position as attorney-general, to enforce the law of which plaintiffs complain. Now, as soon as the said Boyle ceases to be attorney-general, of necessity the suit must abate, because there exists no longer that condition of affairs upon which plaintiffs founded their actions. When these matters are brought to the attention of this court in any way, and especially by one of the parties who has been interested in the controversy, and is still interested, by reason of costs, it will be sufficient to give the court notice so that it may make a proper order abating the suit.

Under no conceivable theory could A. A. Godard, the present attorney-general, be substituted for L. C. Boyle. Godard is not the representative of Boyle. If counsel contend that Godard can be substituted for Boyle because Godard now occupies the office of attorney-general, then they admit that the suit was against the office of attorney-general and not against the individual who occupied the office, and they would thus run up against the proposition that they are seeking to restrain the state, which would be fatal to their proceedings.

One of the essential allegations of the bills filed by Cotting and Higginson against Boyle was, that the said Boyle, as attorney-general, had expressed his opinion to the effect that the law

under controversy was constitutional, and that he intended to immediately proceed to its enforcement. And on the theory that the property of plaintiffs stood in imminent peril from the alleged intended assault on it by the said Boyle, restraining orders were issued against him. How can A. A. Godard be made a party to this proceeding in view of these allegations?

The leading case on this question is United States v. Boutwell, 84 U. S. 604 (17 Wall. 604). Mandamus proceedings were brought against G. S. Boutwell, secretary of the treasury, to compel him to pay a certain order on the treasury of the United States. The suit was commenced in the supreme court of the District of Columbia. That court refused the mandamus and the case was brought on error to the supreme court of the United States. After the case reached the supreme court of the United States Boutwell resigned his office, and an attempt was made to substitute Hon. W. A. Richardson, his successor. Mr. Justice STRONG delivered the opinion of the court. On page 607 he says:

"On the death or retirement from office of the original defendant the writ must abate, in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And, if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty, and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed, in the absence of some statute authorizing it. On the contrary, after the statute of 9th Anne, chapter 20, section 1, it was the acknowledged doctrine in England that the rules and practice as to abatement by death, resignation or removal from office were the same in cases of mandamus as in personal actions. By that statute, it was enacted that the prosecutor or relator may plead to or traverse all or any of the material facts averred in the return, the defendant having liberty to reply, take issue, or demur, and it was directed that such further proceedings might be had as might have been had if the prosecutor had brought his actions on the case for a false return. Thus, mandamus became in effect a personal action against the defendant. This statute was in force in Maryland when the District of Columbia

questions, fully argued at the bar, touching the jurisdiction of the court and the merits of the bill."

Practically, all the cases above referred to were cases in which proceedings were brought against the head of some department of the general government. However, the same reasoning would apply in a suit brought against an attorney-general of a state, especially when that officer is one of the executive officers of the state government, as the attorney-general is in Kansas. If Mr. Godard can be made a party to this suit, it is because he is attorney-general, for in no other way could he be the representative of L. C. Boyle. If, then, Mr. Godard can be substituted for L. C. Boyle, the restraining order in the first instance ran against the office of attorney-general and not against the individual who happened to occupy that office at that time, and such a proceeding would be inhibited by the eleventh amendment of the constitution of the United States.

L. C. BOYLE.

DAVID MARTIN, of Counsel.

142

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Brief of Godard for Appellees

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IN THE

Supreme Court of the United States.

October Term, 1890.

CHAS. U. COTTING AND FRANCIS LEE HIGGINSON, *Appellants*,

vs.

A. A. GODARD, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, AND THE KANSAS CITY STOCK YARDS COMPANY, *et al.*, *Appellees*.

No. 42.

STATEMENT, BRIEF AND ARGUMENT FOR ATTORNEY-GENERAL.

A. A. GODARD,
Attorney-General.

B. H. TRACY,
Assistant Attorney-General.

IN THE

Supreme Court of the United States.

October Term, 1899.

CHAS. U. COTTING AND FRANCIS LEE HIGGINSON, *Appellants*,

vs.

A. A. GODARD, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, AND THE KANSAS CITY STOCK YARDS COMPANY, *et al.*, *Appellees*.

No. 43.

STATEMENT, BRIEF AND ARGUMENT FOR ATTORNEY-GENERAL.

STATEMENT.

On behalf of the Attorney-General of the state of Kansas, we desire to suggest the following statement of facts in addition to those mentioned in the brief of the appellants, and to suggest corrections to that statement as hereinafter set forth.

The Kansas Stock Yard Company was organized as a Kansas corporation in 1871, and by the provisions of its charter had an authorized capital of $100,000. On February 13, 1875, the capital stock was increased to $200,000. In 1876 the company reorganized under the name of the Kansas City Stock Yard Company, with an authorized capital of $500,000. In November, 1877, this capital was increased to $1,000,000. On Decem-

ber 10, 1883, this company again reorganized, as the Kansas City Stock Yards Company, with a capital stock of $2,500,000. In July, 1887, the authorized capital stock was increased to $5,000,000; and in February, 1894, it was again increased, this time to $7,500,000, where it now remains.

Chapter 23, section 14, of the General Statutes of Kansas of 1868, provided that corporations organized under the laws of the state of Kansas might increase their capital stock to any amount not exceeding twice the original authorized capital. This law continued in force until 1883, when the legislature, by chapter 47 of the laws passed at that session, authorized corporations organized under the laws of Kansas to increase their capital to any amount not exceeding three times the original capital. This has been the law in Kansas ever since.

Under the statutes of Kansas in force until since the commencement of this action, a corporation might be created by the mere act of filing a charter with the secretary of state, and each of the above-mentioned corporations was so created. The capital stock of these corporations was increased, as above referred to, by resolution of the board of directors, which is the method authorized by law. When the charter of the Kansas City Stock Yard Company was filed the Kansas Stock Yard Company had outstanding $192,000 as capital stock, or within $4000 of its authorized capital. When the Kansas City Stock Yards Company was organized the Kansas City Stock Yard Company had outstanding $995,000 of capital stock, or within $5000 of its authorized capital. It is apparent that the second and third charters referred to were filed in order to permit the

1422

issue of more stock. The stock of the Kansas City Stock Yard Company issued at the time of its organization was given to the stockholders of the Kansas Stock Yard Company in exchange for their stock; and the stock of the Kansas City Stock Yards Company issued at the time of its organization was given to the stockholders of the Kansas City Stock Yard Company, two shares of the new stock for one share of the old stock, which was equivalent to a stock dividend of $995,000. All of these stocks were issued upon a basis of $100 per share.

Colonel Morse, who was at all times the general manager of these corporations, testified that these reorganizations were had for the sole purpose of permitting the issue of additional capital stock. (Record, p. 345. See also finding 6, record, p. 61.)

These several corporations should be considered for the purposes of this case as a single continuing organization. No change in stockholders or officers was made in either of the reorganizations. They were all organized for the same purposes, engaged in the same business at the same place, and no changes were made in the management, modes of doing business, or the prices charged. The name was changed first by the addition of a word, next by the addition of a letter, and the provisions of the Kansas statute limiting the power of corporations to increase their capital stock were so avoided.

In 1871 the Kansas Stock Yard Company was organized, with a paid up capital of $96,000. In 1876 stock was sold to the amount of $73,000; in 1878 stock to the amount of $42,400 was sold; in 1881, $15,000; in 1887, $535,000; in 1890, $900; in 1893, $55,000; in 1894, $1,667,500 worth of stock was sold, all

of which was disposed of for cash and at par, making a total of $2,484,500 received for subscribtions and the sale of stock, which is all the money that has ever been invested in the Kansas City Stock Yards Company or any of its predecessors by the stockholders thereof. Whatever property or rights the company now owns have all accrued from the investment of said sum, and from that investment have also been paid the dividends hereinafter recited.

Stock dividends purporting to represent investments by purchase, and by improvements made out of the earnings of the corporation, have been declared from time to time to the stockholders. In addition, dividends of stock have been made from time to time, purporting to represent increased value of the holdings of the company, and cash dividends have been declared with great regularity, as will be seen hereafter.

The stock dividends purporting to represent permanent investments made from the earnings of the company have been as follows: 1875, $96,000; 1876, $66,300; 1877, $331,300; 1878, $235,000; 1887, $456,933; 1890, $404,000; 1894, $268,100; 1896, $433,450; 1897, $78,090—making a total of $2,369,173 worth of stock issued to the stockholders without the payment of any money by them, and being within $115,327 of the amount of stock which was issued and paid for in cash.

In addition to these stock dividends, further stock dividends were declared on account of the increased value of the lands held by the company in the following amounts, to wit: 1879, $40,000; 1884, $995,000; 1888, $1,058,067; 1894, $500,000—an

aggregate of $2,593,067, or $109,567 more than the total amount of stock which had been paid for in cash.

In other words, of the $7,368,650 of capital stock issued and now outstanding by the Kansas City Stock Yards Company, $2,484,500 was paid for in cash, and $5,962,240 was issued to the stockholders without the payment of a cent, and as profit upon the investment of the sum first named.

In addition to the foregoing, cash dividends have been declared and paid to the stockholders to the amount of $4,660,976; the dates and amounts of such dividends are shown in the table below — making the total amount of dividends which have been declared upon the investment of $2,484,500 mentioned above to be $9,623,216. (Record, p. 79.) Included in the cash dividends before mentioned were some dividends really made as real-estate dividends; that is, real property was conveyed to other companies or individuals who acted as trustees and took the property for the stockholders of the Stock Yards Company. This real estate was charged to the stockholders at its cost value, although the evidence shows that it had increased, and some of it was repurchased by the Stock Yards Company at an increased value. The table following shows the dividends which have been declared each year for twenty-five years. In 1873 and in 1880 no dividends were declared, but those years are taken into consideration in determining the average dividends paid by the company as stated. The figures in the seventh and eighth columns for each year indicate the amount of cash stock and the total issue of stock outstanding in that year.

Year.	Cash dividends.	Stock dividends.	Total dividends.	Rate per cent. upon stock paid for.	Rate per cent. upon stock outstanding.	Capital stock paid for in cash.	Total issue of stock.
1872	$13,890	.....	$13,890	14.47	14.47	$96,000	$96,000
1874	33,600	.....	33,600	35.00	35.00	96,000	96,000
1875	16,800	$96,000	112,800	117.50	117.50	96,000	96,000
1876	9,600	66,300	75,900	44.91	39.53	169,000	192,000
1877	26,504	331,300	357,804	211.72	108.00	169,000	331,300
1878	28,000	235,000	263,000	124.40	39.69	211,400	662,600
1879	21,150	4,000	61,150	28.92	6.24	211,400	980,000
1881	98,720	.....	98,720	43.60	10.07	226,400	980,000
1882	99,480	.....	99,480	43.90	10.00	226,400	995,000
1883	321,295	.....	321,295	142.00	32.39	226,400	995,000
1884	119,395	995,000	1,114,391	492.21	55.99	226,400	1,990,000
1885	149,250	.....	149,250	65.91	7.50	226,400	1,990,000
1886	119,400	.....	119,400	52.73	6.00	226,400	1,990,000
1887	150,600	456,933	607,533	79.79	30.53	761,400	1,990,000
1888	282,800	1,058,067	1,340,867	176.10	33.19	761,400	4,040,000
1889	323,200	.....	323,200	42.44	8.00	761,400	4,040,000
1890	323,200	404,000	727,200	95.39	18.00	762,300	4,040,000
1891	311,143	.....	311,143	40.82	7.00	762,300	4,444,900
1892	370,192	.....	370,592	48.61	8.33	762,300	4,444,900
1893	296,694	500,000	796,694	97.46	16.11	817,400	4,944,900
1894	451,133	268,100	719,233	28.95	14.39	2,484,500	5,000,000
1895	554,816	.....	554,816	22.33	8.00	2,484,500	6,935,200
1896	429,160	433,450	862,610	34.72	12.44	2,484,500	6,935,200

Average dividend upon cash stock for twenty-five years, 82.95 per cent.
Average dividend upon all stock issued for twenty-five years, 25.53 per cent.

In addition to the dividends mentioned in the foregoing table, a cash dividend of $110,558 was declared on February 1, 1897, and a stock dividend of $78,090 on the same day, making a total of $188,648, equal to 7.59 per cent. upon the cash stock and 2.56 per cent. upon the total stock outstanding.

Included in the property owned by the Kansas City Stock Yards Company is the horse and mule department, which was purchased in 1893 and 1894 at a cost of $230,643.86, the improvements thereon costing $130,000, making a total cost of $360,643.86. This property is situated in the state of Missouri, and is devoted entirely to the horse and mule business, and is managed by a party who handles the business for one-

half of the net profits. The business of this department is done on a different basis from the other departments. Forty cents per day is paid for each horse and twenty-five cents for each mule, which includes feed and water. Where the horses are fed, cleaned and groomed in stalls the price is fifty cents per day. It will be seen that these charges are not affected by the Kansas statute, and would not be affected by it if the horse and mule barns were situate in Kansas. The net income for the horse and mule business of 1896 was $3,790.75, or a small fraction over one and one-half per cent. on the original cost of the property, or eighty-eight one-hundredths of one per cent. of the value of the property as found by the master. (Record, pp. 66 and 72, findings 24 and 34.) It is very evident that the horse and mule business is not connected with the business sought to be regulated by the Kansas statute, that there is no necessity for the business to be done there, and no reason exists why the charges for feeding and yardage of other animals should be high enough to pay the loss on the horse and mule business.

The company conducted its business without a horse and mule market until 1894, and since the establishment of such market the business done there has been very small. In 1896 the number of animals received there amounted to about one per cent. of the entire number received at the yards. (Appellant's brief, p. 10.)

The company owns real and personal property not used in its stock-yards business worth about $1,200,000. (Record, p. 75, finding 41.) The greater part of this property is non-productive, and the income derived from all of it is very small.

On page 11 of the brief of the appellants they call attention to the report of the master, in which he mentions the fact that the affairs of the company have been wisely, efficiently and economically administered; but no mention is made of the criticism of the master which is included in the same finding, being finding No. 40 (record, p. 74), in which it is stated that unnecessary expenditures have been made in the purchase of real estate, and in the provisions made for the doing of the horse and mule business in Missouri. On page 12 of the brief it is stated that it appears from the testimony that the horse and mule department was an absolutely essential part of the business for the necessity of stock-raisers and the competition of other stock-yards, and to support this claim they cite pages 846 and 847 of the record. An examination of those pages discloses that the reference is made to the exceptions filed on behalf of complainants, and not to any testimony in the case. The same reference is made to support the averment that no more was expended upon the horse and mule department than was reasonably necessary therefor. We insist that the testimony does not show that the horse and mule department was necessary for the good of the business of the Kansas City Stock Yards, or that it was an aid to that business.

We urge that the appellants are in error in their statements regarding the mode in which the master arrived at his conclusion touching the value of the property of the Stock Yards Company.

In the forty-third finding of fact (record, p. 77), the master says:

"In approaching the question of the value of the real estate owned and used by the defendant company for stock-yards purposes, I do so with a full sense of the natural and inherent difficulties of the problem, augmented many fold, in this instance, by the confusion and well-nigh hopeless conflict between the evidence of opposing witnesses of apparently equal intelligence, fairness, and means of information. So far as it has been possible, I have given credit and effect to all the testimony offered by the parties, and the figures which follow are believed to express, as accurately as it is possible to ascertain and state it, the value, separately and collectively, of the various tracts of land which make up the principal element of the company's plant. The evidence on this subject was all adduced on the hypothesis that the land was divested of all improvements, but *upon consideration of all adventitious advantages accruing to it from its location and environment, and upon this basis my estimates of the value of such real estate are made, and are as follows.*"

In this connection we desire to call the attention of the court to an expression used by the master, which is repeated frequently in the brief of the appellants with an erroneous conclusion drawn therefrom. Where the master speaks of the "well-nigh hopeless conflict between the evidence of opposing witnesses of apparently equal intelligence, fairness, and means of information," he undoubtedly does not intend to say that all of the witnesses on each side of the case were of apparently equal intelligence, fairness, and means of information, but merely that there were such witnesses or groups of witnesses, but he does not say which are or are not referred to by this expression.

The appellants are also in error in their reference in the statement of facts to the stipulation concerning the gross income and expenditures for the year 1896 by the Stock Yards

Company. Referring to exhibit "S S," on page 81 of the record, and exhibit "F F," on page 82 of the record, it will be seen that the full extent of these stipulations is to settle questions of evidence and determine the manner and purpose for which expenditures were made during the years covered thereby, and there is nothing in the stipulations which indicates to what account those expenditures should be charged upon the books of the company, and whether the items therein should be considered in this case as belonging to the expense of operation and maintenance or to construction or to any other expense or branch of the stock-yards business. Appellants are also in error in the figures made through the statement of facts, in that they have included in the area or amount of property owned by the Stock Yards Company that which is not employed in its business, and in reciting the value of the property of the said company the same error has crept in. By reason of these errors the figures contained in the early part of the complainant's brief, and relating to the value and amount of the assets of the Stock Yards Company and the percentage of income the law permits, should not be taken into consideration, this for reasons which we shall explain more fully under the appropriate headings of this brief.

I.

The Law in Question does not Conflict with the Equality Clause of the Fourteenth Amendment to the Federal Constitution.

Chapter 240 of the laws of Kansas passed at the session of 1897, shown in appendix "A" to the brief of the appellants filed herein, is general in its terms, and is made to apply to all stock-yards which shall do a certain volume of business within the state of Kansas. There is nothing on the face of the law which indicates that any particular stock-yards were selected as the subjects of legislation. The objections made that the law is class legislation rest principally upon the statements of the appellants, and not upon anything of which this court can take judicial notice, or upon anything which is contained in the record in this case. There is no ambiguity apparent in the law, and consequently no reason or excuse for the introduction of legislative journals as aids to its construction. Such journals are only secondary modes of ascertaining legislative intention, and they may be resorted to only when the meaning of the language of an act is itself doubtful.

23 Am. & Eng. Encycl. of L. 336.
Southwalk Bank v. Commonwealth, 26 Pa. St. 446.
Bank of Pennsylvania v. Commonwealth, 19 id. 156.

No evidence was introduced at the trial regarding the number of stock-yards within the state of Kansas, and it does not appear whether or not there are any other yards within the state, or if there be other yards, whether or not they come

within the provisions of the act in question. If there appears to be but one stock-yards plant, and that is the only one of its class in the state, that fact does not affect the validity of the law. The presumption is that the law is valid, and this presumption should not be overthrown by statements that it is class legislation when those statements do not rest upon matters of which the court can take judicial notice or evidence printed in the record, neither can the legislative journals be introduced to create an ambiguity or doubt in the meaning of the law where none previously existed.

A mere reading of the act should constitute sufficient answer to the objections made. The law is framed upon general terms so as to include all stock-yards in which a certain volume of business is transacted, and will hereafter include other stock-yards in which the business shall grow to the volume indicated. The legislature has, by this act, classified the stock-yards of the state into two classes, and has adopted the most natural and reasonable basis for such purposes that could be used, namely, the volume of business done. The reason for this is obvious; the stock-yards doing a large volume of business are necessarily more of monopolies than those doing a smaller business. The public has greater interest in the business of large stock-yards than it has in the business of smaller ones. The stock-yards of Kansas City furnish the most important feeding-cattle market and one of the largest general markets in the United States. They are the habitual resort of purchasers of cattle, calves, sheep, and hogs. They are situated at the gateway of the commerce of a vast portion of the United States, and as a conse-

quence great numbers of shippers of stock are compelled to use these yards, and the business done there is naturally and properly the subject of legislative control. If there be other yards within the state of Kansas doing a business of such a magnitude and nature as the Kansas City yards, those yards come within the provisions of the law in question. If there be no other yards within the state of Kansas doing such business, then the Kansas City stock-yards are the sole representative of their class in the state. The fact that there is but one plant which is properly the subject of legislative control does not deprive the legislature of the power to exercise its authority with regard thereto.

Another reason why the classification should be based upon the volume of business done is, that rates which are reasonable and proper and furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is large, while in a smaller plant doing a smaller volume of business higher rates may be necessary in order to afford adequate returns. It would not be proper to base a classification of stock-yards upon the population of the towns where they might be located, as the business done bears but a trifling relation to the population surrounding the yards.

It will thus be seen that the legislature has adopted a classification which is not arbitrary, which is most natural, and which is best intended to answer the purposes intended by the law and less liable to injure those affected thereby. Such being the case, the question of the volume of business to be trans-

acted which should bring stock-yards within the provisions of the law is purely a matter of legislative determination.

Referring to the clause of the fourteenth amendment of the federal constitution, which prohibits states from denying to any citizen the equal protection of the law, this court has said:

"It only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Kentucky Railroad Tax Cases, 115 U. S. 321.

"It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and liabilities imposed."

Hayes v. Missouri, 120 U. S. 68.

"It may be safely said that the rule prescribes no rigid equality, and permits to the discretion and wisdom of the state a wide latitude, as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice FIELD said, in Mobile v. Kimball, 102 U. S. 704, that 'this court is not a harbor in which can be found a refuge from ill-advised, unequal, and oppressive state legistation.' And he observed in another case: 'It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity.'

"The rule therefore is not a substitute for municipal law. It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons, merely as such, but on persons according to their relations. In some circumstances it may not tax A. more than B.; but, if A. be of a different trade or profession than B., it may. And, in matters not of taxation, if A.

be a different kind of corporation than B., it may subject A. to a different rule of responsibility to servants than B. (Railway Co. v. Mackey, 127 U. S. 205), and to a different measure of damages than B. (Railway Co. v. Beckwith, 129 U. S. 26). And it permits special legislation in all of its varieties. (Railway Co. v. Mackey, 127 U. S. 205; Railway Co. v. Herrick, 127 U. S. 210.)"

Duncan v. Missouri, 152 U. S. 377.

"In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. 'Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice BRADLEY, in Bell's Gap Rld. Co. v. Pennsylvania, 134 U. S. 232–240.

"And Mr. Justice BREWER, in Railroad Co. v. Ellis, 165 U. S. 150, after a careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.'"

Magoun v. Ill. Trust and Saving Bank, 170 U. S. 283.

"Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured — differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify, if not demand, different legislative treatment. Of course, it is not for us to debate

the policy of any particular treatment, and the freedom of discretion which we have said the state has is exhibited by analogous, if not exact, examples to the Missouri statute in Railway Co. v. Mackey, 127 U. S. 204, and in Railway Co. v. Beckwith, 129 U. S. 26."

Orient Ins. Co. v. Daggs, 172 U. S. 577.

See also A. T. & S. F. Rld. Co. v. Matthews, 174 id. 96.

Cotting v. Stock Yards Co., 79 Fed. 681.

In the case of N. Y. N. H. & H. Rly. Co. v. People of State of New York, 165 U. S. 628, this court held a law forbidding the use of stoves for heating cars upon railroads more than fifty miles long to be a valid exercise of the power of the legislature to classify the railroads doing business in that state and not an unjust discrimination against railroads more than fifty miles in length.

The case of City of Topeka v. Gillette, 32 Kan. 431, and nearly all of the other state cases referred to in the brief of appellants upon this point, were decided with regard to constitutional provisions forbidding the conferring of corporate power by special act.

In the case of Topeka v. Gillette, the law there under consideration was held void, not because it applied to three cities only, but because the law purported to be applicable to cities of the second class, and then by its terms was limited to those cities of the second class which had a certain number of inhabitants, and to such only of those cities as should take action under the law within ten days after it took effect, and only fifty-eight days were allowed after its passage within which to take any action, after which the law was to be a nullity. The court took judicial notice of the matters and things which show

the application of the law, and determined that, because three cities were singled out of a class of cities ten in number, and then the law was only allowed to act in such a limited mode as to indicate further intention to limit its operation, it must be held to confer special corporate power.

There is no intention to avoid the provisions of the federal constitution shown with regard to this law. It does not appear whether or not the law could in any way operate upon other stock-yards, and the authorities cited are not in point.

The appellants also claim that the legislature intended the act to apply only to stock-yards which had done a certain volume of business prior to its passage. This is not the reading of the statute. It should be read so as to make it refer to any stock-yards which shall hereafter do the prescribed volume of business. Such was the construction placed upon the law by the court below. (Cotting v. Kansas City Stock Yards Co., 79 Fed. 681.) If the statute is subject to two constructions the one should be given it which would tend to make it a valid law, and it must be presumed that the legislature intended it to have such a meaning. This is a fundamental rule of statutory construction, and needs no citation of authorities here.

It is also claimed by the appellants that, if it is contemplated by the law that its provisions shall apply to any other stock-yards in the future, there will necessarily be a discrimination of twelve months during which the defendant company will be deprived of the equal protection of the law. This objection is technical, and not real; the legislature could not well say that a stock-yards company possessing certain area or number of

pens should come within the statutes, and those possessing lesser facilities remain without. The regulation intended was properly measured by the volume of business done, and not the amount of property or the sum invested therein; neither could the classification be based on a single transaction, or the aggregate transactions of a single day. It requires that the business of a considerable period be measured in order to reach a just determination of the question; hence the Kansas legislature said that stock-yards which should do a business for one year which should include an average receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep, should be declared to be public stock-yards. It is only after such a volume of business has been done that a company is brought within the terms of the law. The Kansas City Stock Yards Company did a business greater than the amount prescribed by the statute for more than one year before it became subject to the law; so it will be with any future corporation engaged in that business which shall do such volume of business as to bring it within the statutes.

II.

The Act of the Legislature of Kansas of March 3, 1897, Does not Attempt to Control Business Done Outside the State.

A reference to the statute itself should be sufficient answer to this contention. Section 1 provides that stock-yards "within this state" doing a certain volume of business are declared to be public stock-yards. Section 2 provides that any person, company or corporation owning or operating such yard or yards "in this state" is declared to be a public stock-yards operator. Section 4 provides that it shall be unlawful for the owners or employees of such public yards "within this state" to charge more for yardage than the prices therein fixed. Section 5 provides that it shall be unlawful for the owners or employees of stock-yards "in this state" to sell and deliver hay or grain at prices greater than those regulated therein. There is nothing in the act which indicates any intention that it shall operate outside of the state. The law took effect on March 12, 1897. (Laws of Kansas passed at session of 1897, page 450.) The bill of Chas. U. Cotting was filed in this action on March 13, 1897, and a restraining order issued on that day (Record, p. 1–20); consequently no attempt has ever been made to enforce the provisions of this law either within or without the state of Kansas. The question as to the extent to which the law may operate territorily is not involved in these actions. The issue with regard thereto is not framed in

the pleadings and the appellants are in error in claiming that we are urging that the law should have extra-territorial force. The question involved in this proceeding is as to the validity of the law, and the questions regarding the subjects of its operation must be hereafter answered if the law is by this court sustained. The appellants endeavor to show that the circuit court in its final decree attempted to give the law extra-territorial force, which is not the fact. The circuit court, in the exercise of a doubtful power, granted an injunction upon the allowance of an appeal, and made its order broad enough to cover all possible liability of the Stock Yards Company without attempting to define the extent of such liability. If the law is a valid exercise of legislative power, the Stock Yards Company cannot wholly escape its operation by reason of the fact that it is situated on both sides of a line which divides two states.

Under this head the appellants quote evidence with regard to the feeding and watering of cattle at the Kansas City stock-yards, and claim that such feed and water are given the animals for the benefit of the stock shippers or vendors and that such feed and water is immediately sold by them at a high price. We do not so understand the situation. It appears to be the custom to feed and water cattle in the yards; this is a humane and proper custom. Whether it had its origin in the desire of the owner to obtain a greater price for his cattle or in the desire of the Stock Yards Company to sell its feed does not appear, but in view of the fact that the business of feeding is handled in connection with the management and operation of the yards,

and large profits are made therefrom, it would seem highly probable that the Stock Yards Company is responsible for the custom. The buyers who patronize these yards, according to the testimony, purchase the cattle before they are fed, and pay for them upon weights made after feeding. Such appears to be the universal custom. It is evident, therefore, that the buyers make due allowance for this custom and that the seller of cattle must buy feed for them or be cheated in his sale of the cattle; consequently the arrangement is such as to compel the feeding at the stock-yards of both hay and grain under circumstances which permit the company to absolutely dictate the prices and control the profits which it shall realize thereon. It is safe to say, therefore, that the owner of the cattle does not sell the feed and water which the animals receive, and receives no benefit from the purchase of such feed.

The argument that the final decree dismissing the bills, if affirmed, would permit the Stock Yards Company to incur risks of the severe penalties prescribed by the act for hay and grain sold in Missouri and for the yardage of cattle in that state should have no weight. It should not be presumed that any officer of the state of Kansas, in the performance of his duty, would attempt to enforce this or any other statute of the state in any other than a just and reasonable manner; and in determining the extent to which the law covers the transactions of the Kansas City Stock Yards Company, the officer must be supposed to exercise some judgment and some discretion, and not be presumed to desire or intend to needlessly harass or persecute any one.

It is claimed on behalf of the appellants that the act of March 3, 1897, unjustly discriminates against the Stock Yards Company in its regulation of the prices at which feed is to be sold. It is shown by the testimony that the Stock Yards Company purchases its hay and grain in large quantities, and presumably these are bought at wholesale prices and at the time of the year when such prices would ordinarily be the lowest; yet the act permits such feed to be sold for prices not greater than twice the market value thereof at the time of the sale. The market value in the local market of Kansas City is the retail price and not the wholesale price, and as the company is permitted to sell at retail at twice the retail market price, feed which it has bought at wholesale and for a wholesale price, it would seem that a discrimination could not be found in the law.

The testimony and the findings point to the fact that the patrons of the stock-yards are practically compelled to purchase feed of the Stock Yards Company, and while the master has found that on some occasions shippers feed on the cars before the stock reaches the yards, it is evident that such feeding must be an inconvenience, and in the case of shippers from any considerable distance it is practically impossible; consequently only such persons as are exceedingly anxious to save the difference between the value of the feed and the exorbitant prices charged by the Stock Yards Company would go to the trouble and inconvenience of feeding on the cars. Again, it is apparent that the persons who feed before their stock arrives at the stock-yards are at a disadvantage, because of the fact that the

stock is sold and purchased with the expectation and implied understanding that it should be fed and watered just before weighing, as hereinbefore stated.

Harry P. Child, one of the principal witnesses for the complainants, testified that the amount of hay sold at the stock yards in 1896 was about 11,500 tons (Record, 113–115). He also testified that the amount fed the cattle is usually 100 pounds to the car-load of twenty-two to twenty-five head, and to sheep an average of fifty pounds to a car of 120 to 240 head (Record, 367, 368). The amount of hay sold during the year 1896 was twenty-three million pounds. The total number of cattle, calves, horses and mules received at the yards for 1896 was 2,865,671 head; consequently the hay sold at the stock-yards for that year amounted to more than eight pounds for each animal received, exclusive of hogs.

Counsel for the complainants find fault with the act in question because it is not in its terms limited in its operation to the state of Kansas, and reiterate the charge that we claim the law should have its operation in the state of Missouri. They have no right to bring this question of extraterritorial force into this case. It is true that in a brief filed in this case in the circuit court, when it was in the management of other attorneys, representing the former attorney-general, who was then a party to this suit, it was said with much force, and not without reason, that the Kansas City Stock Yards Company, being a creature of the state of Kansas and existing only by virtue of its laws, undoubtedly had the right to do business outside of the

state of Kansas, but if in so doing it violated any of the laws of the state, the state had the right to punish such corporation for that infraction. We now say, as we have before stated, that the question of the extent to which this law shall operate is not in this case, but must be determined hereafter.

III.

The Business Done at the Kansas City Stock Yards is Public in its Nature and is Impressed with a Public Use.

The fact that the business of the Stock Yards Company is impressed with a public use does not seem to be disputed by the appellants, and no question is raised in their brief as to the power of the legislature to declare such yards public yards, or to regulate the prices at which feed may be sold there. Any objection which may be raised upon either of these propositions has been long since set at rest by the decisions of this court, the principal of which are:

Munn v. Illinois, 94 U. S. 113.

Water Works v. Shopler, 110 id. 347.

Budd v. New York, 143 id. 517.

San Diego Land and Town Co. v. City of National City, 19 Sup. Ct. 804.

IV.

The Act of 1897 Permits the Stock Yards Company to Earn a Reasonable Income.

We contend that the main question involved in this case, and the only one which is not "foreclosed by controlling authority, is whether the maximum rates prescribed by the Kansas statute for yardage and feed of live stock are fair and reasonable — the rights of the public considered — or in their nature confiscatory."

In the consideration of this question, it is necessary first to determine from the evidence and the findings of the master the total value of all property owned and used by the company for stock-yards purposes at the time this action was begun.

The appellants have suggested three methods of calculation:

First. By ascertaining, separately, the present value of the physical property, real and personal, owned and used by the company for stock-yards purposes, adding thereto the value of the good-will of the business existing at the stock-yards, basing both of such values upon the cost of reproduction, thus distinguishing the property from naked lands and improvements.

Second. By ascertaining the market value of the capital stock of the company prior to the passage of the statute in question, less the value of any property owned by the company not used for stock-yards purposes, such value of the capital stock measuring the value of the stock-yards plant as an entirety.

Third. By capitalizing the net earnings of the plant at the prevailing rates of interest, deducting therefrom the value of any property which may not fairly be deemed a part of this completed structure and used for stock-yards purposes.

We deny the correctness of each and all of these methods, and contend:

First. That the only value of the property to be considered for any purpose in an inquiry of this kind is that of the tangible, physical property of the company; that the value of the real estate is to be determined by considering it as a body of naked land upon the general market, subject to purchase and sale for all purposes for which a demand may exist—for stock-yards, for railroads, for packing-houses, for manufacturing and mercantile purposes, with all the advantages which may accrue to it in consequence of its location near the corn belt as well as the cattle ranges of the country, in the heart of a great city, surrounded by all the railroads, packing-houses, manufacturing and mercantile plants there existing and in operation, and by reason of the limited area of land in the vicinity available for such purposes.

Second. That in a proceeding of this kind, wherein is to be determined the reasonableness of the rates to be charged by a corporation the amount of whose capital stock issued and outstanding is admitted to be far in excess both of the amount of money actually invested in the concern and of the value of the tangible property, no value of the capital stock above its face or par value can be used or considered in any event for the purposes of such determination.

Third. That the value of the good-will or "live business" is not an element of value to be considered in this case, for the reason that the state of Kansas in nowise seeks to take anything from the appellants or the Stock Yards Company, and that the good-will or "live business" is to be in no manner or degree regulated, disturbed or diminished by the operation of the Kansas statute.

V.

The Amount for which the Capital Stock of the Kansas City Stock Yards Company can be Sold is not of Itself any Adequate Basis for Determining the Value of such Plant.

Counsel for the appellants argue that the market value of the capital stock of the Kansas City Stock Yards Company, or of any such corporation, furnishes sufficient evidence upon which to base an estimate of the value of the property owned by such company, and that it should be allowed to earn sufficient income to pay a reasonable rate upon such value. A mere examination of the situation is sufficient to overthrow this contention. The facts which give the state the right to legislate concerning the rates to be charged at such yards take this corporation out of such rule, if any rule of the kind exists. The Stock Yards Company has a monopoly of the business which is done there. The dealers are compelled to patronize these yards and to pay prices which the company may see fit to charge for its services, in the absence of a statute to the contrary; consequently, the greater the extortion perpetrated at the yards the greater the income from its business, and the greater the market value of its capital stock. The fact that the company has made enormous profits and declared enormous dividends in cash and stock has given the capital stock a market value somewhat above par, notwithstanding the fact that it is capitalized for approximately four times what the property has cost, and notwithstanding the fact that it has

in recent years made improvements and bought property in the state of Missouri which yield but a very moderate return upon the capital invested. It is evident that the market value of this stock has been created because of the fact that the corporation has been able to fix its own prices for services performed and accommodations furnished and to force the collection of these charges. The business of the Kansas City Stock Yards Company is done practically without risk. The stock yarded and fed is of great value. The company does not surrender the possession of the animals until its charges are paid or assured. Being the only market at Kansas City, the only place where buyers assemble, the only place where the commission men and dealers are located, being adjacent to the great packing-houses of the second largest market in the world for the sale of beef-cattle and hogs, and the largest market in the world for the sale of feeding cattle, it has by its business management compelled the yardage of animals intended for market, in these yards, and by the custom of the yards compelled the purchase of feed for these animals. Hence it is natural to expect that doing such a business, having the privilege and power to charge what it pleases therefor, and incurring no risk of loss thereon, the profits of the business have been such as to give the stock a market value much greater than its actual value.

Mr. Harry P. Child, assistant general manager of this institution, testified as follows (Record, p. 177):

"It is an open and notorious fact of information that money in large quantities—of a million dollars and upwards—is con-

tent to accept a very low rate of interest, provided the security is ample; for instance, when a government loan is placed, they have no difficulty in selling the bonds at two or three per cent. The Stock Yards Company, having been in active, live and continuous existence and paying regular dividends of about six per cent. for twenty-five years, and never missing a dividend, is recognized by the commercial world and commercial interests and the capitalist as being as secure as government bonds; and from the fact that it pays about double the interest I assume that they measure the value of the stock at about double the premium they place upon government bonds, that being about the status to-day."

It will be seen that the witness shrewdly refers only to the *cash dividends* paid by the Stock Yards Company, and does not include the *stock dividends* paid by it. He evidences his knowledge of the fact that the basis of the market value of the Kansas City Stock Yards is its ability to pay dividends, and its ability to pay dividends rests upon its power to collect money from the persons patronizing the yards. Hence the absurdity of the contention of appellants, and the apparent righteousness of our claim that the Stock Yards Company should only be entitled to earn and pay a reasonable profit upon the actual value of the property owned and used by it, and this without reference to the market value of watered stock upon which dividends have been paid by reason of exorbitant charges.

Col. Chas. F. Morse and Mr. H. P. Child, the witness just referred to, were the principal witnesses on behalf of the complainants in the court below, they being the general manager and assistant general manager, respectively, of these yards. Both are men of great ability, chosen to manage the great in-

terests of this large company, greatly interested in the outcome of this proceeding, and shrewdly able to place their views of the situation before the court in the light most favorable to the Stock Yards Company.

Mr. Morse testified as follows (Record, p. 324):

"I have tried to explain that the good-will is a part of the value of the property, and the whole property would be decreased in value probably more than one-half if the rates made by the Kansas law were put in force, and I think the good-will would shrink out of sight."

This statement made by the general manager of the company, intended to impress the court with the loss which would accrue to the Stock Yards Company by reason of the enforcement of a law which would allow the company to earn exceedingly large profits upon the cash invested in the business and upon the actual cost of the property used, is an admission that the stock of the Kansas City Stock Yards Company contains an enormous amount of water; that the intangible something which the complainants have presented to the court in various forms, and always in large amounts, as good-will of the business, is a fictitious value, based entirely upon the fact that the company has heretofore been able to charge exorbitant prices for its services. Looking at the situation generally, observing that the company has had a monopoly of the business, and noticing the enormous profits which have accrued to it in the past, it can readily be seen that the values sought to be established by the complainants in this case are wholly fanciful and out of reason.

In support of the contention that the estimate of value

should be based upon the market value of the capital stock, counsel cite the cases of The Adams Express Co. v. Ohio, 165 U. S. 194, and 166 U. S. 185, both of which citations refer to the same case, upon its original hearing and upon a rehearing in this court, in which was involved the constitutionality of a statute of the state of Ohio regarding the taxation of telegraph, express and telephone companies in that state. This statute provided that a board of assessors should

"proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio; and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof and the other evidence and rules as aforesaid."

The court did not decide the contention involved in that case as to whether or not such valuation was excessive. (165 U. S. 229.) The statute did not require that the assessment should be based upon the value of the capital stock alone, but only required the state board of assessors to ascertain the true value in money of the property and business of the companies within the state of Ohio, and authorized the consideration of the market value of the capital stock as evidence to be taken with other evidence in determining the question; and the opinions furnish no ground for the contention of the complainants herein

that the market value of capital stock determines the actual value of the property owned by the corporation.

It is apparent that the market value of the capital stock of a corporation engaged in a competitive business, in which the earnings are more or less problematical, would naturally be more nearly equal to the value of the property owned by the corporation than in the case of a corporation possessing an absolute power to compel whatever earnings it might see fit to make.

The fact that pending the passage of the law in question the market value of the stock of the Kansas City Stock Yards Company declined seventeen points, as shown by the testimony (Record, p. 78), is additional evidence of the fact that the value of the stock furnishes no adequate measure of the value of the property of the corporation. The value of its property does not fluctuate under the influences of the stock market. It also appears, as is shown by the finding of the master (Record, p. 78), that sufficient of the stock of this corporation has not been sold to justify an estimate of value based upon market quotations.

The fact that the stock of the Kansas City Stock Yards Company has never had a market value greater than $141 per share is conclusive evidence that investors do not believe the actual value of the property owned by the company to be equal to the par value of its stock, or anything near that amount. The shares of a corporation which has paid an average dividend for twenty-five years of 82.95 per cent. upon the cash invested therein, and an average dividend for the same period of 25.53 per cent. upon all outstanding capital stock, and particularly

where, as in this case, the corporation has a certainty that its volume of business will continue, and a certainty of being able to collect its charges without loss — the stock should be worth several times its par value, and would be worth that amount if it were not the judgment of investors that such stock was based very largely upon wind. The market value of railroad and other stocks and securities — matters within the common knowledge of all — furnish comparisons which show a lack of confidence in the stock of the Kansas City Stock Yards Company.

VI.

In Determining Whether or not the Rates Permitted by the Act of 1897 are Reasonable, Reference Must be Had to the Actual Value of the Property Affected Thereby.

"What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property—injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable, if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account or the cost of construction, and that the pres-

ent value of the property is not accurately represented by either the stocks and bonds or the original construction account. Nevertheless, the amount of money that has gone into the railroad property — the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds — is not to be ignored, even though such sum is far in excess of the present value."

Ames v. U. P. Rly. Co., 64 Fed. 177.

In the same opinion, which was written by Mr. Justice BREWER, on page 179, attention is called to the difficulties which embarrassed the court in that case, and rendered the computation more than ordinarily difficult. These embarrassments arose from the fact that the law therein questioned sought only to reduce the charges upon a certain class of the earnings of the railroads affected thereby, and that it did not attempt to affect the earnings upon interstate freight business or upon passenger traffic. *The opinion clearly shows the determination of the court to consider the question of the reasonableness of the rates prescribed with reference to the income and expenses of the business affected and without regard to the business not affected by the law.* This case presents fewer difficulties than the one referred to. The investment in the property affected by these rates, and the value of such property, can be approximately, if not entirely, segregated from the other property of the company, and an estimate can be made of the return which may be earned upon the property affected. It is argued by appellants that the horse and mule market and the Gould barn return a smaller percentage of income than the other property, and that the charge for yardage and feed should be sufficiently large to enable the company to pay a

reasonable interest upon the sums invested in these properties. It is argued that the horse and mule market is necessary for the general good of the business, but we find no reason why a horse and mule market is a necessary appendage to a stock-yard. It must be observed that the rates in vogue at the horse and mule market are not affected by the law. Horses are kept for a charge of so much per day, regardless of the amount of feed consumed by them, and such feed is not sold by measurement at that market. (Record, p. 66.) Much of the business done at the Gould barn is carried on on the same basis. It is evident that, if the Gould barn and the horse and mule market were making large returns upon the capital invested therein, the appellants would insist with the same earnestness that such portion of the property of the company should be disregarded in determining the question of reasonableness of rates. It must also be noticed that the market and barn just referred to are both situate outside of the state of Kansas, therefore, outside of the jurisdiction of the Kansas legislature and of the courts of the state.

Another case directly in point upon this subject is the case of San Diego Land and Town Company v. City of National City *et al.*, decided May 22, 1899 (19 Sup. Ct. 804), in which was involved the question of the reasonableness of rates prescribed by ordinance of the city of National City for the use or sale of water supplied to that city and its inhabitants. The court held that the water company was entitled only to demand a fair return upon the reasonable value of the property at the time of use, holding, as was held in the Ames case, *supra*,

that the court might take into consideration, as an element of inquiry, the cost of the property and the amount of its bonded indebtedness; and upon the question as to what portion of the investment should be considered in determining the amount that should be earned, the court held that such portion of the water-works plant as was outside of the city, and was not employed in the business regulated, namely, the business of furnishing water to the inhabitants of the city, should not be considered, saying upon this subject:

"One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers outside of the city are to be considered in fixing the rates for consumers within the city. In our judgment, the circuit court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point."

This court has held in various cases, as was stated by Mr. Justice BREWER at some length in the case of U. P. Rly. Co. v. Ames, *supra*, that in determining the question of reasonableness of rates, and the value of property upon which a return is to be earned, the court should take into consideration the amount of capital invested, the amount of bonded indebtedness, the rate of interest which such indebtedness bears, the question as to whether the return allowed would be more than sufficient to pay the first- or second-mortgage bondholders, and other questions of like character. In addition to this, it is held that the rights of the public must also be considered in determining the question as to the reasonableness of rates. It therefore fol-

lows that, if the amount of capital invested in a business can be taken into consideration for the purpose of raising the amount upon which interest is to be paid beyond the actual value of the property involved, the amount of capital invested can also be taken into consideration for the purpose of reducing the sum upon which interest is to be paid below the value of such property, and especially when that value is based upon exorbitant charges leading to exorbitant earnings in the past. The Stock Yards Company has for many years been conducting a business impressed with a public use, and the public has had an interest in that business, although the legislature has not seen fit to exercise any control heretofore. Nevertheless such use has existed and the public has had an interest in the increase of value and growth of the business as well as the Stock Yards Company, and the Stock Yards Company should not be permitted to receive and retain the entire profit arising out of the increase in value of its property and business by reason of adventitious circumstances which it has in only a small way controlled, and in which the public has had an equal interest with the Stock Yards Company.

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged, and as the demurrer admitted) could not earn more than four per cent. on its capital stock. It cannot be said that a corporation operating a public highway is entitled as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. When the question arises whether

the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations; such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a cor-

poration controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. What those other circumstances may be it is not necessary now to decide. That can be best done after the parties have made their proofs."

Turnpike R. Co. *et al.* v. Sanford *et al.*, 164 U. S. 578.

"The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case by reason of the admitted fact that, with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and one-half per cent. on the original cost of the road, and only a little more than two per cent. on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equaled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

Dow v. Beidelman, 125 U. S. 680.

"*Second.* As to valuation: For purposes of the company, the value of the property, including both railway and lighting plants,

appears to have been placed at $14,250,000, represented by the issue of bonds for $7,250,000, preferred stock $3,500,000, and common stock $3,500,000; but this aggregate was clearly excessive after excluding the electric-lighting department, and on no view can it be taken as the basis for the present consideration. The statements of the actual cost of the constituent street-railway properties, including the cash investment for improvements, are necessarily complicated, from the fact that payments were partly made in stocks and bonds, and the aggregate amount varies according to the ratio of valuation placed upon the bonds alone—in two statements in which the stock is excluded, and in one statement which values both stock and bonds—the minimum being $9,024,107.85, and the maximum $11,313,829.84. The former amount was subsequently modified (page 465, complainant's proof), making the statement of cost $8,885,644.17; and as this excludes any valuation of stock and places the value of the bonds at the discount agreed upon between the parties, which also seems fair, it may justly be taken as representing the true amount invested. But adoption of this purchase amount does not meet the issue, as it is the value of the investment, and not the amount paid, which must control."

Milwaukee Electric Railway and Light Co. v. City of Milwaukee, 87 Fed. 583, 584.

In estimating the value of the tangible property of the company there was no possible plan to be pursued except to ascertain the value of its segregated parts, and thereby the probable cost of its reproduction. Otherwise there was no means of determining the value of the property as a whole. There had been no purchases or sales of like concerns to fix the market value of the plant as an entirety, or to throw any light on the subject of its value as such.

Whilst the appellants contend that it was erroneous and unfair to fix the valuation of the plant by an appraisement of its

segregated and component parts, and that it should have been valued as a unit — a complete and going concern — there was really no substantial difference between the methods adopted by the opposing parties in the introduction of testimony for the purpose of determining the value of the tangible property, in the proceeding before the master.

The appellants sought to show the value of the real estate, apart from the improvements, situated as it was and to be used only for stock-yards purposes, placing the value of the improvements at the cost of their construction.

We sought to show the value of the real estate, apart from the improvements, *upon the general market, subject to purchase and sale for the purposes of stock-yards, railroads, packing-houses, manufacturing, and for all other purposes for which a demand might exist, taking into consideration all of the advantages accruing to it in consequence of its location near the corn belt and near the cattle ranges of the country, in the heart of a great city, surrounded by all the railroads, packing-houses, manufacturing and mercantile plants existing and in operation, and of the limited area of land in the vicinity available for such purposes;* and also placed the value of the improvements at the cost of their construction as shown by the evidence.

All possible value "resulting from the combination of the means by which the Stock Yards Company's business is carried on"—from its connection with railroads, packing-houses, or other concerns — was taken into consideration by the witnesses in fixing their values of the tangible property, it being necessarily included in the value of the real estate and improvements,

and was duly considered by the master in his valuation of the property.

Any value this "combination of means," or these connections with railroads, packing-houses, etc., may possess, aside from that of the physical property by which they are afforded, must result from the use or good-will of such physical property, and is not to be considered in a proceeding of this character.

Although the appellants complain of the methods of valuing the real estate and the improvements of the company separately, it will be seen that they adopted that plan of valuation at the very outset, and pursued it all the way through the proceedings before the master.

D. M. Palmer, one of the principal witnesses for the appellants, testified as follows:

Ques. "Considering this plant as a going concern, as an entirety, as an assembling of various pieces of physical property there, please state to the special master how you would proceed to get at the selling price of such a property as that.

Ans. "I should take first the value of the land down there, as near as I could get at it, and then the value of the improvements, with all of these various facilities that have been furnished; I would consider the receipts, the earning capacity, under those conditions, the location of the property with regard to the supply from which those receipts could be drawn in the future also; all that would go to make up the value I would put upon the property."

All the other witnesses for the appellants proceeded to value the property of the company in the same manner, separating it into parts and parcels at the request of counsel, and stating

—

their opinion as to the value of each; and the same method was pursued by the witnesses for the defendants.

A great deal of testimony on the subject of values was wholly incompetent and utterly worthless, the witnesses having no information upon which to base their judgments, or being permitted to predicate their opinions as experts upon nothing more than mere assumptions, instead of established facts. It will be observed that most of the witnesses for the appellants based their opinions as to the value of the company's real estate as a body of land upon the market price of scattered and isolated lots or small parcels which had been sold, or were held for sale, at so much per front foot, without any knowledge or means of knowing what such property would be worth per acre or in a large tract, such as the main yards of the Stock Yards Company. A few of the witnesses on both sides, however, appeared to have sufficient knowledge concerning the value of real estate in the neighborhood of the stock-yards to render their testimony competent and worthy of consideration; and the witnesses so qualified were found by the master to be "of apparently equal intelligence, fairness, and means of information." So far as it was possible to do so, the master gave credit and effect to the testimony of all of such witnesses, and estimated the value of the real estate accordingly, taking into consideration "*all adventitious advantages accruing to it from its location and environment.*"

Chas. F. Morse, vice-president and general manager of the Stock Yards Company, was appellant's main witness on the subject of values, and he was the only witness who undertook

to testify concerning all and every part of the company's property. He is a large stockholder in the company, and was obviously interested in fixing the value of the company's property at as high a figure as possible. His testimony throughout shows a disposition to put an extraordinary value upon everything tangible or intangible owned or claimed by the company. The record does not disclose that his interest in the result of the controversy was taken into consideration by the master in weighing the testimony, but it is evident that the master would have been warranted in so doing.

On the other hand, the witnesses who testified concerning values on behalf of the defendants were all disinterested parties, and could not have been influenced in any manner or degree by any pecuniary or other interest in the matter in controversy. Five of these witnesses, viz., C. G. Parker, E. F. Allen, R. E. Cable, C. W. Whitehead, and W. S. Beard, were men who had been engaged for years in the real-estate business in Kansas City, Mo., were informed as to the values of lands situated in the neighborhood of the stock-yards, and each of them showed himself to be fairly competent to testify concerning the value of the lands in question. Each of these five witnesses testified as to the value of that part of the main yards situated in Kansas, consisting of 40.659 acres, and the average of the values fixed by them thereon was $20,500 per acre; and the same witnesses, omitting R. E. Cable, testified also concerning the value of the part of the main yards situated in Missouri, consisting of 41.708 acres, and the average of these witnesses thereon was $34,875 per acre. We call attention to the fact

that, in striking the average between this valuation and that of the witness Morse, who fixed the value of the same land at $56,000 per acre, the result is $45,437.50 per acre — substantially that found as the value of the same property by the master. The quarantine yards, consisting of 13.415 acres, were valued by Morse at $12,000 per acre, and the same value was placed thereon by the master.

The north yards, consisting of 14.9 acres, were valued by the master at $23,000 per acre, which was a fair average of the values fixed thereon by the witnesses. It will be seen, therefore, that in the light of all the testimony on the subject, regarding all the *competent* witnesses as possessing "equal intelligence, fairness, and means of information," and considering all the influences and circumstances likely to affect the weight of the testimony and the credibility of the witnesses, the finding of the master as to the value of the real estate used for stock-yards purposes was proper and correct. (Record, p. 77.)

There appears to be no controversy about the value of the structures, buildings and other improvements owned by the company and used for stock-yards purposes, and valued by the master at $1,480,000.

He also found the value of the personal property on hand December 31, 1896, to be $307,377.25, making a total valuation of all tangible property owned by the company and used for stock-yards purposes of $5,388,003.25, which findings may be summarized as follows (Record, p. 77):

Value of real estate,	$3,600,626 00
Structures, buildings, and other improvements,	1,480,000 00
Personal property on hand December 31, 1896,	307,377 25
Total,	$5,388,003 25

In this total value is included the sum of $307,377.25, the value of the personal property on hand December 31, 1896. This property was in nowise used in or necessary to the business of the company during the year 1896, and should not be included in the value of the property used for stock-yards purposes during that year.

It is conceded that the total receipts of the company for the year 1896 were $1,012,271.22, and there should be no controversy about the amount of disbursements properly chargeable to operating expenses for that year. The master found this amount to be $365,712.49, leaving a net income for the year of $646,558.73. The appellants contend, however, that to the sum of $365,712.49, found by the master to have been the total disbursements from the operation of the stock-yards only for the year 1896, should be added the sum of $169,584.65, making the total operating expenses for the year $535,297.14; and they insist that under the terms of a certain written stipulation set forth in the record (p. 82) this sum should be charged to the operating expenses for the year 1896. It is idle to contend that the language of this stipulation should be given any such meaning. So far as it relates to the business of the year 1896 the language is as follows:

"For the purpose of removing any question which may exist in regard to the manner in which the earnings of the Stock

Yards Company were disbursed during the years 1892, 1893, 1894, 1895, and 1896, for operation, maintenance, and extensions of improvements, it is agreed as follows:

. . . . . .

"1896: The gross earnings were $1,023,870.20. From this amount there was expended, in addition to the $368,059.05 shown by the 'profit-and-loss account' for that year, the following amount: $176,394.60. *This amount was disbursed for the following purposes.*"

Then follow the items making up the sum of $169,584.65, *charged by the company to the "construction account" for that year*, and which were expended during the year for the construction of extensions, new buildings, and improvements. These extensions and improvements, as shown by the items in the stipulation, increased the amount and value of the company's property at least to the extent of their cost, and there was no reason why the same should be charged to the *operating expenses* for that year.

For years it had been the practice of the company to charge the expenses of such extensions and improvements to the "construction account." They had not been charged to *profit and loss* nor included in the "operating expenses." The amount so charged to "construction account" had been capitalized from time to time by the issue of stock to take the place of the earnings so invested, and the same course was pursued in 1896, as we shall hereinafter show, in relation to this item of $169,584.65

Mr. Morse testified that

"all of these items have been charged to construction account and the amounts have been from time to time capitalized by the

issue of stock; part of it was sold for cash and some of it was issued to take the place of net earnings invested in that way." Record, pp. 235, 238.

The items which make up this construction account for 1896, as testified by Mr. Morse, "consist of labor in the construction and renewal of sundry buildings, chutes, fences, railroad-tracks, viaducts, drainage, water services, paving in the yards, paving streets, sidewalks, etc., amounting to $181,292.75." In this amount are included the items and sum of $169,584.65 in controversy.

There is nothing in the language of the stipulation nor elsewhere in the record amounting to any agreement or admission that this sum of $169,584.65 should be charged to the "operating expenses" or "profit-and-loss" account for the year 1896. It was charged to the "construction account" and there it should remain, thus leaving the total disbursements from operation of the stock-yards only, for the year 1896, $365,712.49, as found by the master.

It must be borne in mind that repairs to the amount of $32,-309.22 had been charged in the profit-and-loss account (Record, p. 70).

The master was in error in finding No. 33½ that the item of $169,584.65 had not been covered by an issue of stock.

He found that since 1892 the structures and other improvements have been of a more permanent character, and that prior to 1896 stock had been issued upon the value of such inprovements.

The total amounts carried to the construction account on the books of the company for the years 1892 to 1896, both inclusive, was $779,-

957.15 (Record, pp. 82–91, exhibit FF). *The total amount of capital stock which was issued by the company after 1892 based upon earnings carried into construction was $779,640* (Record, pp. 79, 740–744); hence the item of $169,584.65 should not and cannot be considered in making any computation regarding rates of earnings for 1896. Subsequent to 1888 there were no stock dividends on account of increased value of land, and all such dividends made after that year were on account of earnings carried into construction. (Record, pp. 214, 215, 216, table, finding 48, p. 79.)

Under these facts, the net income of the yards for 1896 was $646,587.73—a rate of profit on the value of the real estate, improvements and personal property of the company, as found by the master, of 11.99 per cent.

The master found the value of the real estate and personal property owned by the company but not used for stock-yards purposes to be $1,200,000 (Record, p. 76). There is some contention by the appellants that in this sum there was improperly included the amount of $126,140—the value of certain tracts of land which should have been included in the property used by the company for stock-yards purposes. But an examination of the evidence shows that these two tracts lay entirely outside of the premises used for stock-yards purposes, and that the master properly included their value in the $1,200,000.

These tracts are described by the master as follows (Record, p. 75):

"(*d*) 8.028 acres on the west side of the Kansas river and opposite the main yards in Kansas, appearing on exhibit Z as

D. It was purchased in 1892 at $4,000 per acre, and is now worth about $5,000 per acre, or $41,140.

"(e) 12.122 acres bounded on the north by Central avenue, on the east by Water street and the north yards, on the south by the M. P. yards, and on the west by the Kansas river. This is a part of the tract marked on exhibit Z as E. Its cost was $39,058.55, all of which, except $810.53, was paid by the company in 1884–'5. Its present value is about $85,000."

As we have stated, both of these tracts lay entirely outside of the premises used for stock-yards purposes, and, as shown by the evidence, were both unfit for present use, and could never be used for the purposes of the Stock Yards Company without being filled, leveled, and otherwise improved. It will not be seriously contended by the appellants that the value of these two tracts should have been omitted from that of the property not in use, as found by the master.

Judge FOSTER was mistaken in thinking that these tracts should have been included in the property used by the Stock Yards Company. Colonel Morse, testifying as to one of these tracts, speaks of it as containing about seven acres, and again as containing eight and six-tenths acres, and says that it is unused, and will have to be raised about seven or eight feet to make it available (Record, pp. 192, 193, 246).

The master found that this tract contained 8.028 acres, and was described as follows: "8.028 acres on the west side of the Kansas river and opposite the main yards in Kansas, appearing on exhibit Z as D" (Record, p. 75).

Concerning the other of these two tracts, which was found by the master to contain 12.122 acres, "bounded on the north

by Central avenue, on the east by Water street and the north yards, on the south by the M. P. yards, and on the west by the Kansas river" (Record, p. 75), Colonel Morse testified that the same is largely under water, might be properly termed a sand-bar, has never been enclosed or improved or used for stock-yards purposes, and that none of the grounds "west of Water street" has ever been enclosed or improved (Record, p. 267).

The first of these tracts was valued by the master at $41,140, and the second at $85,000, making the $126,140.

The master found, and it is conceded that the application of the Kansas statute to the business of 1896 would have reduced the gross income $300,651.77, leaving the same for that year $711,619.45.

We now come to a calculation of the rate per cent. of profit for the year 1896, based upon the finding by the master, and as shown by the profit-and-loss account on the books of the company. (Record, pp. 79, 80.)

(1) Total receipts,	$1,012,271 22
Total disbursements,	365,712 49
Net income,	$646,558 73
Applying statutory rates,	300,651 77
Net income,	$345,906 96

Rate per cent. of profit on valuation of $5,388,003.25, as found by the master, 6.42 per cent.

(2) Total receipts,	$1,023,870 20
Total disbursements,	368,059 05
Net income,	$655,811 15
Applying statutory rate,	300,651 77
Net income,	$355,159 38

Rate of profit on total capital stock, $7,368,650, 4.8 per cent. Rate per cent. of profit on value of all property as shown by the books of the company, $6,588,003.25, 5.4 per cent. (Record, p. 80.)

It is claimed by the appellants that, in estimating the value of all of the company's property for the purposes of this case, there should be added to the value of the tangible property that which they call the good-will or "live business" of the company, and on which the appellants' witnesses put a value ranging from a million and a half dollars upward. The value of this so-called good-will was calculated in different ways. For instance, the witnesses Child and Morse claimed that the entire value of the good-will should be measured by the premium on the capital stock; and the witness Morse also contended that it should be measured by the amount of money which the company had actually paid out in building up and developing its business, and the amount so paid he claimed to have been $1,500,000.

We contend, as heretofore stated, that in this proceeding nothing can be added to the value of the tangible property on account of the good-will of the business. It is not the purpose of the Kansas statute to deprive the company of its property or business; and if the company's charges for feed and yardage are reduced to a fair and reasonable point, this so called good-will or "live business" will necessarily in no measure be destroyed or taken away, but should on the contrary, in the very nature of things, be increased. The more reasonable the company's charges the greater would be its volume of business.

The witness Morse fixes the value of the good-will at $2,000,000, claiming that the company has paid out $1,500,000 to secure the good-will, and admits that every dollar so paid out has been charged up in the value of the tangible property and against the state of Kansas in this proceeding. It occurs to us that if this so called good will is a thing of value which has been secured at a cost of $1,500,000, and its value is to be measured by what it cost, and has already been included in the sums invested which go to make up the value of the plant, it should not be included or added a second time. In other words, if the stock-yards company paid $1,500,000 for good-will, it exchanged the money paid for the thing purchased, and did not retain the value of both. Concerning this matter Mr. Morse as follows:

Ques. " . . . Now in your case, you have charged up in favor of the stock-yards and against the people of Kansas in this inquiry every dollar that you have paid out to purchase this good-will, have n't you?

Ans. "Yes, sir.

Q. "Then you go to work and add two millions of dollars to the value of this property for this good-will, the cost of which has already been once charged, do you not?

A. "We have created that value by the payment of that money, and we are entitled to estimate it in our value.

Q. "You have paid out a million and a half of money in the purchase of this good-will, and you have charged it up in favor of the Stock Yards Company, and now you want two million dollars more than that, Colonel?

A. "Well, in any business transaction, as I understand it, if you put one dollar in an enterprise or a property, and it becomes worth three, you are entitled to put that value upon it. That would be my answer. What we have paid for it has realized to us a very considerable profit." (Record, pp. 326, 327.)

. . . . . .

Q. "You spent a million and a half of dollars in putting them there, and thereby you created this good-will. Well, now, you have charged us up with this million and a half of dollars, and it appears on the books, does it not?

A. "Yes, sir.

Q. "There is no difference of opinion between you and me on those points, Colonel, but you have undertaken to designate and specify certain definite sums that you have paid out and which have gone to make up and develop conditions which you are pleased to term good-will.

A. "Yes.

Q. "You say it would cost you two million of dollars to do that, and that the two million of dollars would be the value of the good-will of the business. Now, we say that when you have put in that two millions of dollars — spent it, and charged it up on the books of the company — that that would constitute the value of the good-will.

A. "Yes, sir.

Q. "Where do you get the other two million, then?

A. "I think the difference between us is that you are talking about cost and I am talking about values. I think that is really the difference, because the cost of a thing does not represent its value.

Q. "You say it cost one million and a half to put those things there. Do you mean to add a million and a half more, or that the whole business would be three million and a half?

A. "I mean just what I have stated; that, in addition to the value of the property to which I testified as to land and improvements, that the value of the business or the good-will is two million dollars." (Record, pp. 328, 329.)

The amount of the capital stock issued and outstanding is $7,368,650. Appellants contend that this stock was at a premium ranging from fifteen dollars to forty dollars per share at the time the Kansas statute became effective, March 12, 1897; and they also contend that this premium on the stock

should be taken as a fair measurement of the value of the good-will.

The evidence shows, and the master found, that by the time the Kansas act took effect the stock was practically at par. Concerning this matter Mr. Williams testified as follows (Record, p. 499):

Ques. "Do you know what this stock was worth at any time during this year?

Ans. "I think $135. I do n't know whether it was prior to the introduction of this bill into the legislature or since.

Q. "You do n't know what the stock is worth to-day?

A. "I do n't; it is down.

Q. "You do n't know how much it is down?

A. "No, sir. I think it must have fallen off at least twenty-five or thirty points.

Q. "When did that fall occur?

A. "It has been gradual. You see, all the stockholders did n't find out about the legislation at the same time; they are scattered all over the country, and they did n't find out what had happened.

Q. "The charges that were made by the Stock Yards Company for yardage and feed would have considerable to do with the question as to the market value of the stock, would it not?

A. "Very much, of course, because it affects the earnings directly.

Q. "How much would it affect it?

A. "I do n't know how much the earnings are cut down; if the earnings are cut in two the stock will go below par. . . .

Q. "Do you know the value of this stock now? That is the thing I want to know.

A. "The last I heard in Chicago it was down very near par.

Q. "That was when?

A. "Some two or three weeks ago."

In relation to the same matter Mr. Morse testified as follows (Record, p. 291):

Ques. "When these stock dividends are made the stock is issued to the stockholders at par?

Ans. "Yes, sir.

Q. "They do not pay any premium?

A. "No, sir.

Q. "When the stock is sold on the market it brings a premium, does it not?

A. "In some cases it does, but generally it has been sold at par, but there were a few sales at a premium.

Q. "The quotations on the stock market are given at from $1.15–$1.18 to $1.20, are they not, for the stock?

A. "Yes, sir, that is about it; there has been very little that has been sold on the market; it has been sold for what it would bring whenever it has been sold.

Q. "From fifteen to eighteen per cent. premium?

A. "Yes; I don't know what it is just now.

Q. "It has been above par for a great many years, has it not?

A. "Yes, sir.

Q. "About how many years.

A. "For a great many years there were no quotations whatever because it was an unknown stock; it was unknown on the market; but I would say that for the last fifteen years it has commanded a premium on the market.

Q. "Ranging about how high?

A. "I think it has been up as high as $1.40, and has run down as low as $1.10; there has never been very much of it on the market; if there had ever been any large block of the stock on the market it would probably have sold for very little above par; the occasional sales of a few shares are all that have been bid for."

The same witnesses testified further (Record, p. 324):

Ques. "You think that your good-will would be affected if you were to put in the rate specified in the law, which would satisfy the shippers better than the rates which are now in operation; you think your good-will would be hurt by that, do you?

Ans. "I have tried to explain that the good-will is a part of the value of the property, and the whole property would be decreased in value probably more than one-half if the rates made by the Kansas law were put in force, and I think the good-will would shrink out of sight."

In view of this testimony, there can be no question about the correctness of the master's finding that the stock had probably fallen to its par value before the act in question became effective. The last sale of which there is any account was made in February, 1897, while the legislature was in session, at $115 per share. If the stock was at a premium of thirty-two per cent. in January, there must have been a drop of seventeen points between the two dates, and it is altogether likely that the decline continued more rapidly down to the passage of the act, when the stock was at a point substantially at par.

It is very apparent that where the capital stock of a corporation equals or, as in this case, exceeds the value of the property owned by the corporation, and such corporation is permitted to earn sufficient moneys to keep such stock at par on the general market, the earnings must be considered as fair and reasonable, and the stockholders can have no right to complain that they are deprived of their property without due process of law; and from this we deduce two propositions:

First. If the value of the stock is to be regarded as the

measurement of the value of the property of the Stock Yards Company for the purposes of this case *no value of the stock above* par can be considered.

Second. Unless it can be shown that the adopting of the maximum rates prescribed by the Kansas statute will cause the value of the capital stock of the Stock Yards Company to decline to a point below the actual value of the property owned by it such maximum rates must be considered as fair and reasonable.

Where the stock equals or exceeds the investment the fact that the stock will sell at par indicates conclusively that investors believe it capable of earning a fair and reasonable value upon the investment. If investors will purchase such stock at a price above par, it necessarily means that the stock at par will yield more than a fair and reasonable return upon the investment.

It therefore follows that, if in the consideration of this case the so-called good-will is an element to be taken into account in estimating the value of the plant as a unit, the value of such good-will cannot in any event exceed the difference between the value of the tangible property and the par value of the stock. This difference was found by the master to be $780,000 (Record, p. 78).

An effort was made to show by the testimony of "expert" witnesses that the value of the so-called good-will was upwards of two million dollars. These witnesses claimed to have no personal knowledge whatever of the value of the tangible property

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aside from that already possessed by the master, and the question put to each of them was substantially:

"State what, in your opinion, is the value of the plant, considered as a unit, assuming that the value of the tangible property is from five to seven million dollars?"

It is evident that an answer based upon such an hypothesis can be nothing more than guesswork. Absolute knowledge of the value of the tangible property alone could afford no means or method by which to estimate the value of the good-will. Business prospects, rates to be charged for services, yardage, and feed, earning capacity, net income and still other things must of necessity be taken into account in answering intelligently such a question. And since in the judgment of each of these witnesses the so-called good-will was measured by the premium on the stock, and that in turn depended upon the net earnings, and they upon the further fact that the company was permitted to fix its own charges unrestricted by the legislature, such opinions as to the value of the good-will were of no consequence and entitled to no consideration.

In relation to this matter, Judge THAYER said:

"It is fair to infer that a large amount of stock has been issued by the company, not so much with reference to the actual value of the physical property as with reference to the income which it could be made to produce and the dividends which it could be made to pay. That this latter consideration has been a potent factor in producing the present volume of stock is a necessary inference from all the testimony. For these reasons the capital stock cannot be taken as truly representing the value of the corporate property in a proceeding where the inquiry as to its value is made for the purpose of

ascertaining whether certain rates prescribed by the legislature for yarding and feeding cattle are reasonable or unreasonable. The fact that the state possesses the power to prescribe a maximum charge for such services necessarily prevents the court from giving as much weight to the possible income-producing capacity of the property in controversy as it might give if the Stock Yards Company was vested with the right to charge as much for such services as it thought proper. *Neither can the opinion of certain experts as to the value of such property be regarded as reliable, much less as conclusive, because such opinions are doubtless based to a considerable extent on the income which the property can be made to yield and upon the assumption that the owner has the right to determine what price he will charge for the use of his property.*"

There was no possible way under the evidence to estimate the value of the so-called good-will upon the cost of reproduction, for the reason that the estimates of the witnesses testifying on that subject were wholly conjectural. The evidence showed clearly that by far the greater part of the sum which had been expended by the company in building up and developing its business had increased the value of the real estate and was taken into consideration by the appellants' witnesses in fixing their values thereon.

Thus the tangible property of the company was again given the benefit, to that extent, of a double valuation. But since the value of all property, tangible and intangible, owned and used by the company for stock-yards purposes has been ascertained by the master in a proper manner, so far as it was possible to do so under the evidence, it only remains to be determined whether upon that valuation the enforcement of the Kansas

statute would reduce the rate of net income to an unfair and unreasonable figure, the interests of the public considered.

By formulating numerous tables, which are set forth in their brief, appellants have attempted to show that the statutory rates, applied to the business of 1896, would have reduced the net receipts to an unreasonable degree.

We take the trouble to call attention to two of these tables, which appear at page 49 and again at page 128 of appellants' brief. The grounds on which the calculations and figures in the other tables are based are so far assumed and so unwarranted by the evidence as to require no comment.

The first of the two tables in question starts out with the assumption that the total amount of operating expenses for the year 1896 was $535,297.14 or 52.51 per cent. of the total receipts for that year, and assumes further that the "written stipulation," about which appellants have so much to say, amounted to an absolute agreement between counsel that the sum last mentioned was in fact properly chargeable to the operating expenses for the year 1896. With these assumptions involved in the calculations, the table then proceeds to show the cost of operation and maintenance and net income from the sale of feed at the yards in 1896, including the horse and mule department and the Gould barn.

The second of these tables purports to set forth the same sort of a calculation, applying the statute to the business of the year, and is as follows:

Table No. 2.

	Gross income.	Cost of operation and maintenance the same as in table No. 1.	Net income.
Amount received for feed served to cattle, calves, hogs, and sheep (less cost of feed).....	$74,258 34	$78,992 13	—$4,733 79 (Deficit.)
Amount received for feed in horse and mule department (less cost of feed).....	27,385 59	14,380 17	13,005 42
Amount received for feed in Gould barn (less cost of feed).....	6,104 27	5,343 71	706 56
Totals.....	$107,748 20	$98,716 01	$9,032 19

It will be observed that the first column is intended to exhibit the gross income from three sources, under the application of the statute in question. As shown in the first table, the gross income from the sale of feed served to cattle, hogs, calves and sheep was $150,432.54. The master found that the statute applied to the gross receipts for 1896 would have reduced them $300,651.77, a per cent. of reduction of 29.7. This per cent. of reduction applied to the $150,432.54, the gross receipts from feed served to cattle, hogs, calves, and sheep, would leave the gross income from that source, under the statute, $105,754.08. Applying to this the rate per cent. of operation and cost of maintenance assumed and set forth in the first table, the result is a net income of $26,761.25, instead of a deficit of $4733.39, as computed by appellants. *The sum of $74,258.34, claimed as the gross income under the statute, in table No. 2, is in fact the cost of hay and grain consumed by cattle, calves, hogs and sheep during the year, as found by the master* (Record, p. 74).

The second item in table No. 2, under gross income, $27,385.59, is in fact the gross income from hay and grain consumed in the horse and mule department for the year, as found by the master (Record, p. 74); whereas, in order to show the result of the application of the statute to that item of income, this sum of $27,385.59 should have been reduced 29.7 per cent., leaving $19,252.07. Applying to this the above-assumed rate of operating expenses, the result is a net income of $4871.09.

The third item under "Gross income," in table No. 2, is in fact the cost of the hay and grain consumed in the Gould barn, as found by the master (Record, p. 74), instead of the gross income from that source reduced 29.7 per cent., which leaves $7154.12. Applying to this the above-assumed rate of operating expenses, the result is a net income of $1810.41, making the net income from the three sources, under the application of the statute, $33,444.26, instead of $9032.19. For the purpose of showing correctly the result of applying the statute to the gross income from the three sources mentioned in these tables, assuming that the relation of the gross operating expenses to the gross receipts was 52.51 per cent., we submit the following table:

	Gross income.	Rate per cent. of operation and cost of maintenance (assuming total operating expenses to have been $337,643.70), 52.51 per cent.	Net income.
Amount received for feed served to cattle, calves, hogs, and sheep (less cost of feed).....	$105,754 08	$78,992 13	$26,761 95
Amount received for feed in horse and mule department (less cost of feed).....	19,252 07	14,380 17	4,871 90
Amount received for feed in Gould barn (less cost of feed).....	7,154 12	5,343 71	1,810 41
Totals.....	$132,160 27	$98,716 01	$33,444 26

As a matter of fact the rate per cent. of operation and cost of maintenance for 1896 was 36.12 per cent. This is the relation which the operating expenses, to wit, $365,712.49, bear to the gross income, $1,012,271.22, which is practically the same percentage as was testified by Colonel Morse (Record, p. 199).

We apprehend that none of these tables will be found of any value to the court in determining the percentage of profit earned upon the branches of business involved therein, but if they are to be considered we submit the following as being a correct exposition of the theory advanced by appellants. Applying the statute to the three sources of income in question, which causes a reduction of 29.7 per cent., and applying the rate per cent. of operation and cost of maintenance, which, as we have seen, is 36.12 per cent., the following table is a correct exhibit of the business to which these tables relate:

	Gross income.	Rate per cent. of operation and cost of maintenance, 36.12 per cent.	Net income.
Amount received for feed served to cattle, calves, hogs, and sheep (less cost of feed).....	$105,754 08	$54,336 23	$51,417 85
Amount received for feed in horse and mule department (less cost of feed).....	19,252 07	9,891 67	9,360 40
Amount received for feed in Gould barn (less cost of feed).....	7,154 12	2,584 06	4,570 06
Totals.....	$132,160 27	$66,811 96	$65,348 31

We have urged that the disputed item of $169,584.65 was properly charged to the construction account, and that this is particularly true in the light of the fact which the master seems to have overlooked, namely, that stock was issued as a dividend to the stockholders to cover the same as an addition of that amount to the value of the property. It would seem as if nothing more need be said upon this subject; but if the matter is to be further considered, we invite the attention of the court to the following items, which ought not, under any circumstances, to be charged to operation or maintenance (Record, p. 90):

Charged by the master and on company's books to construction account		$169,584 65
For completion of the new Missouri addition to the exchange building begun in 1895, including $386.08 for a new vault in the Kansas part of the building.....	$24,854 35	
For completing power plant begun in 1895,	5,950 56	
On hay and grain barns, for moving one barn, enlarging it, and fitting it up, $600, and the rest for the erection of three new barns where there had been none before	3,676 95	

Chutes and fences in new yards in new Missouri extension	$24,892 56	
New sheep sheds built in the north yards on the site of former cattle pens	12,541 71	
Viaducts (expended for an extension in the main yards of viaducts built in 1894)	6,809 80	
Water-supply (for pipes, hydrants, etc., to carry water to pens and new hog and sheep sheds in the north yards, necessitated in place of former water pipes by rearrangement of the sheds)	3,926 40	
Office furniture, new	1,052 44	
		$114,375 57
		$55,209 08

The appellants have apparently urged from the beginning of this case that, in fixing a basis of value upon which they should be permitted to earn income, an intangible something which they call "good-will" should be added to the value of the property. No case has been found by the appellants or by ourselves in which the question of good-will has been considered as forming a basis for prospective profits. We apprehend that there is little of merit in the appellants' contention upon this subject, and the testimony in regard thereto is of slight value, if any. The witnesses for the appellants, who came from other cities, and who were asked to place a value upon the stock-yards property based upon the market value of its real estate and improvements, testified upon a subject concerning which they could furnish no additional light to the court. They were unable and did not attempt to give the market value of any of the property of the Stock Yards Company. They possessed no more information regarding the amount of business done at the stock-yards than had the court, and in all probability their knowledge

of the subject was much less. No possible reason existed why they should have been permitted to testify. Their testimony consisted of conclusions based upon facts already in the possession of the court, and involved no questions of special experience which would make them experts in regard to such value. The fact that they were called and placed upon the stand shows the straits to which appellants have been driven in securing testimony to bolster up and enlarge the value of the property of the Stock Yards Company.

As we have elsewhere stated, the public has an interest in the growth of business at the yards similar to that of the Stock Yards Company. Simply from the fortuitous fact that these yards were located in the early history of this market has arisen the great volume of business done there. Kansas City is the only large market within the great corn belt of the United States, and is at the point where all the railroads of the West and Southwest have centered. The business of handling stock had to be centered at Kansas City, and would have come there regardless of the efforts of the Stock Yards Company; which being the fact, the public has just as much interest in the value of the market as the Stock Yards Company. The stock-yards business at this city is a natural monopoly, and if the Kansas City stock-yards were to-day wiped out of existence another market-place would soon be found where all the business would be done, and as much business would center there as is now centered at these yards. The donations which have been made to secure the location of packing-houses have been given, not for the purpose of securing the building of such institutions at

Kansas City, but for the purpose of locating them adjacent to the stock-yards, and to prevent other companies from engaging in competitive business of that character. The Stock Yards Company having secured these advantages, and having thereby secured a monopoly of the business, should not be heard to contend that the monopoly has given them a right to tax the people doing business there, so that it may pay interest upon the value of the power which it possesses.

The merchant who buys the good-will of a business in which he is about to engage will not for a moment claim that such good-will, or the volume of trade which results therefrom, should enable him to charge greater prices for his goods than he would otherwise charge; on the contrary, having secured the good-will of the business, he will naturally sell goods cheaper because such good-will enables him to do a larger business. So it should be with the stock-yards. Having control of a business the volume of which is now enormous, they should be able to furnish cheaper facilities rather than dearer ones, and the fact that they have a monopoly of the business should be an argument in favor of lower rates rather than in favor of higher ones. The prices paid by the owners for yardage and feeding of animals seem small; but when we recall the fact that shipments are usually large and the dealers bring to the stock-yards several hundred animals in each shipment, and those animals are driven into a pen where they stay for a few hours and are then driven a short distance across scales where they are weighed and delivered to purchasers, the charge of twenty-five dollars per hundred head for such service is an enormous

one; especially when we recall the fact that a single pen may in one day receive and discharge several shipments of cattle at the undeviating rate of twenty-five dollars per hundred head.

It must also be borne in mind that during much of the time in which the Stock Yards Company has been making such enormous profits the yardage rates for cattle were twenty cents per head instead of twenty-five cents, and that in 1891 the company unnecessarily, arbitrarily and wrongfully raised its rates. (Record, pp. 129–151.)

The question of the reasonableness of the rates prescribed by the statute should be considered solely with reference to the income and expenditures of the business affected and of the business necessarily and properly incidental thereto. As the horse and mule market is outside of the state of Kansas and is independent of and separate from the Kansas business, being managed by an individual who conducts the business done there, and the Stock Yards Company receives fifty per cent. of the profits of such business in compensation for the use of its plant, the cost of this property should be deducted from the value of the stock-yards property and not taken into consideration under this branch of the case, and the income therefrom should be deducted from the net income of the Stock Yards Company.

It is apparent that each of the witnesses who testified as to the value of the stock-yards property on behalf of the appellants had a greater or less interest in placing the value of such property at a high figure, either because of a direct and personal interest in the management and affairs of the company,

or because such witness was the owner of real estate in the vicinity of the stock-yards. While, on the other hand, none of the witnesses called on behalf of the attorney-general had any interest in the outcome of this action, and their knowledge of values was based upon actual experience and acquaintance with the sale of property in that vicinity. It is highly probable, indeed, that these witnesses placed their values too high, as their estimates were based upon knowledge of the sales of individual town lots, which sold at so much per front foot, and in testifying they have estimated acre property at the same rates as sales were made for small tracts. No serious objection can be found or made to the estimate of real-estate values determined by the master; at least no objection can be made that those estimates are too low, as they are substantially an average of what all of the qualified witnesses testified to regarding such values.

We insist, therefore, that a fair estimate of the values of the real estate used by the Stock Yards Company cannot be greater than the amounts found by the master. The cost and value of such he determined to be as follows:

	Cost.	*Value.*
Main yards in Missouri.....	$1,691,619 59	$1,876,860 00
Main yards in Kansas.....	230,110 81	1,219,770 00
North yards.....	40,594 72	161,496 00
Quarantine yards.....	102,659 44	342,500 00
Totals.....	$2,064,594 56	$3,600,626 00

Record, pp. 64–77.

We urge that the following statement of the stock-yards business done for 1896, and the estimate of what it would have paid

under the rates prescribed by the act of 1897, is absolutely fair to the Stock Yards Company:

Value of real estate owned and used by the company		$3,600,626 00
Structures, buildings, and improvements		1,480,000 00
Personal property on hand December 31, 1896		307,377 25
		$5,388,003 25
Deduct horse and mule market		430,420 00
		$3,957,583 25
Gross income of Stock Yards Company, 1896		$1,023,870 20
Deduct amounts received from rents, outside property	$6,007 45	
Deduct amounts received from interest and dividends	5,591 53	
Deduct expenditures of operation	365,712 49	377,311 47
		$646,558 73
Deduct net income of horse and mule market		3,790 75
		$642,767 98

This is equivalent to 13.71 per cent. upon a value of $3,957,583.25.

Applying the statutory rates to the business of 1896, and deducting $300,651.77 from the net income mentioned above, leaves $342,116.21 as the net profit upon the business which is subject to the law, or 8.65 per cent. upon $3,957,583.25.

Applying the statutory rates, $342,116.21, the net earnings upon the stock-yards proper, is equivalent to six per cent. upon $5,701,933.50.

Value of stock-yards proper, capitalized on six-per-cent. basis	$5,701,933 50
Value of horse and mule market	430,420 00
Value of property not used for stock-yard purposes	1,200,000 00
Total value of property owned by company	$7,334,353 50

Estimating the value of the stock-yards property which is affected by the law of 1897 at such a sum that the net profits thereon would equal six per cent., or $5,701,933.50, gives such property a value $1,744,350.25 greater than the value of the actual tangible property subject to the operation of the law; and this sum is most certainly sufficiently large to cover any possible estimate which would include "good-will," "going concern," or any other value sought to be attributed to this property by the appellants.

We think the appellants do not seriously contend that any change should be made in the figures first above given, except that they claim that the business of the horse and mule market should be included in the computation, and that to the value of the property owned by the Stock Yards Company should be added an estimate for good-will. The appellants refer repeatedly to the testimony upon which the master's findings are based, and contend that he has only estimated the values of parcels of the property, and that he did not take into consideration the value of the entire property as a "going concern." An examination of the record shows that such was not the fact. All the witnesses who testified regarding the value of the real estate testified as to the value of separate parcels and tracts. The property was necessarily divided into the four parcels referred to by the master; as, the main yards in Missouri, main yards in Kansas, north yards, and quarantine yards. The master took into consideration, as has been stated, all the circumstances surrounding the location and situation of the property in question. The witnesses who testified for the appellants as to the value of the

lands in question did not refer to the value of the premises as a going concern, further than that some of them attempted to place an estimate upon what they considered or called good-will, which is merely an estimate upon the value of the business done. Any testimony as to the value of good-will or as to the value of a going concern which is based upon a given value of the real estate and personal property and a statement of the income and expenses of the Stock Yards Company is of no value in any court. When the witnesses had testified as to the market value of the real estate employed in its business, the value of the improvements placed thereon, the amounts of the receipts and expenditures of the Stock Yards Company, there was no room for any further or other testimony upon this subject, because the court was then in possession of all the facts necessary to enable it to render a decision.

The business of 1896 was apparently taken by both parties and the court below as a basis for the determination of this question. This seems very proper in view of the fact that the business of the company is a steady one and not liable to fluctuation. It must be evident to the court that, with the growth and development of the southwestern portion of the United States, particularly western Kansas, Colorado, New Mexico, Arizona, Oklahoma, Indian territory, and Texas, the cattle business done at these yards must increase year by year, and that these yards are destined to become the greatest of their kind in the United States.

We do not ask that the Kansas City Stock Yards Company be permitted to earn only a reasonable percentage of profit

upon the money which has been actually invested in its business or upon the actual cost of its property. We recognize the fact that this property has greatly increased in value since the organization of the stock-yards, and we are willing that the company be permitted to earn a reasonable interest upon the value of its property; but in determining this question as to the reasonableness of rates, we ask the court to consider the table of figures showing the dividends paid, set forth in the statement of facts above, and determine whether or not a reduction of $300,651.77 for the business of 1896 would have been an unjust and unreasonable exercise of legislative power. It will be seen from this table that in 1896 dividends were declared to the amount of $862,610, equal to 12.44 per cent. upon the entire capital stock of the company. If the statutory rates had been in force then the amount of this dividend would have been reduced to $561,958.23, equal to 8.1 per cent. of the outstanding capital. In the face of these figures, it seems to us absurd that the complainants can urge that the reduction provided by the statute of 1897 will not permit a reasonable return to the stockholders of that company.

VII.

The Acts of Congress and the Regulations of the Department of Agriculture of the United States upon the Subject of Quarantine do not Deprive the State of Kansas of the Power to Regulate the Charges for Feeding and Yardage.

The acts of congress and the regulations referred to under the ninth point of appellants' brief do not attempt to fix charges for the performance of any service by the stock-yards, and do not attempt in any manner to regulate the stock-yards. They are not under the management or control of the federal government, which has merely prescribed rules and regulations to be observed in the conduct of that business. It does not appear that the law here in question affects the right of the government to enforce its rules and regulations in any manner, and until this is made to appear the courts will not enjoin the operation of the law on account of such statutes and regulations. The arguments urged on this point will, if carried out, lead to the conclusion that anything which is the subject of congressional action or control cannot be the subject-matter of state legislation. The only effect which the action of congress and the rules of the department of agriculture have upon the business of the Kansas City Stock Yards Company is to compel the performance of additional services and the incurring of additional expense. The additional expense of a compliance with the statutes and regulations referred to must, of course, be taken into consideration in determining the question of the reasonableness

of rates to be charged, as it involves the Stock Yards Company in an expenditure of money for permanent fixtures, and requires additional labor and expense in the handling of its business, all of which has been included in the figures given regarding the cost of the plant and the expenses of operating the same. The law in question is less of an interference with interstate commerce, when regarded with reference to the quarantine statutes and regulations, than was the one involved in the case of Missouri, Kansas & Texas Rld. Co. v. Haber, 169 U. S. 613, in which it was held that a statute of the state of Kansas imposing liability upon a railroad company transporting cattle liable to impart infectious diseases was not a violation or an interference with the federal statutes and regulations or with any of the interstate-commerce laws or powers of the United States; and the cases referred to in that opinion have a bearing upon this case as indicating the extent to which, along certain lines, the legislature of the state may act in prescribing rules and regulations governing the importation of cattle from other states without trespassing upon the powers of congress over that subject. Upon the general question as to whether or not the act of March 3, 1897, interferes with the rights of congress under the interstate-commerce clause of the constitution, to which this portion of the appellants' brief is subordinate, we shall refer in another subdivision.

VIII.

The Interstate-commerce Provisions of the Federal Constitution and the United States Statutes upon that Subject do not Prevent the State of Kansas from Regulating Charges at the Kansas City Stock-yards.

In the first place, it does not appear in the record, so far as we have observed, that any of the stock fed, watered or cared for at the Kansas City stock-yards were unloaded and fed on account of or in pursuance of the act of congress of March 3, 1873, being sections 4386–4390 of the Revised Statutes, and which relates to the feeding and watering of animals conveyed from one state to another, and prohibits the confinement of such animals for a greater period than twenty-eight consecutive hours.

Stress is laid upon finding No. 30 of the master, to the effect that in 1896 about 100,000 head of live stock were unloaded at the Kansas City stock-yards, cared for, and again shipped therefrom, under the claim that the transactions at the stock-yards were mere incidents of interstate shipments of such live stock; but finding No. 30 should be construed in connection with finding No. 32, from which it appears, as well as from the evidence, that it is customary to ship cattle to Kansas City on through bills of lading, naming some other point of destination, with the privilege that the cattle may be unloaded and detained for a time at Kansas City, and also with the privilege that cattle so shipped may be sold there, and that, under this privilege granted

by the railroad company, cattle so shipped, unloaded and placed in pens are usually sold, but that approximately 100,000 head of those so unloaded at Kansas City did not find a market there which was satisfactory to the owners, and these animals were reshipped. It is evident that after the animals are unloaded at the stock-yards they are subject to the control of the owners or their agents. It is common knowledge that stock is usually shipped to market in the charge of one or more individuals who accompany them, and presumably the owners of stock so unloaded are present directing where it shall be placed in the stock-yards, giving directions with regard to the feeding, and endeavoring to dispose of the stock so unloaded. The fact that when such animals are reshipped the expenses for yardage are paid by the railroad company indicates nothing more than the existence of a custom. The fact remains that the cattle are unloaded for the purpose of being sold, whether they are reshipped or not; and that being the case, what takes place while they are unloaded has no connection with or relation to the shipments of the animals or any question of interstate commerce. The attention of the court is called to the fact that the number of animals so reshipped during the year 1896 was less than one fifty-fourth of the number received at the yards. If by any possibility it could be determined that as to this, or any other branch of the business, the interstate-commerce powers of the federal government forbid the state from regulating the charges of the Stock Yards Company, this branch could be relieved from the operation of the law without affecting its validity.

It is difficult to see how it can be claimed that an act of the legislature of the state of Kansas designed to prevent the imposition of exorbitant charges for the yardage and feeding of animals in stock-yards can be held void because of any interference with the interstate-commerce law of the federal government.

Counsel for the appellants have exercised great diligence and ingenuity in discovering and citing authorities which they claim support the contention, and, indeed, it would be strange if out of the mass of decisions rendered by this court upon questions of interstate commerce something could not be found to support almost any theory advanced.

If it be determined that the business done at the Kansas City stock-yards constitutes interstate commerce, still it does not follow that the state has no power to pass such a law as the one in question. It has been repeatedly held by this court that the power of congress over interstate commerce in all its branches and ramifications is not exclusive, but that upon many subjects the state may act where congress has not seen fit to do so; such is the case in regard to quarantine charges, and upon the subject of the regulation of wharfage charges the same ruling has been made. The latter subject is clearly akin to that of stock-yards. It has, we believe, been uniformly held that the state has the power to regulate the charges which shall be made for the use of wharves, for loading and unloading vessels, whether engaged in interstate commerce or not. It would seem that such wharves are necessary instruments for the completion of a shipment, and to that extent there is greater reason why

states should not control them than there is why they should not control stock-yards. At the stock-yards the shipment is ended in the ordinary course of affairs, the animals have been delivered to the Stock Yards Company, which holds them as the agent of the owner, and the service of the carrier has been performed and completed. The duties regarding the transportation are ended while at the wharf; the duty of the carrier is not ended until the goods are delivered; consequently the question of wharfage is more nearly akin to the question of carriage than is that of yardage; yet this court has stated repeatedly that the question of the reasonableness of charges for wharfage is one of local interest, and unless congress has seen fit to take some action with regard thereto the states may clearly do so.

Transportation Co. v. Parkersburg, 107 U. S. 691.
Ouachita Packet Co. v. Aiken, 121 id. 444.
Packet Co. v. St. Louis, 100 id. 428.
Vicksburg v. Tobin, 100 id. 430.
Packet Co. v. Keokuk, 95 id. 80.
Canon v. New Orleans, 20 Wall. 577.

In like manner many other subjects of state legislation trench upon subjects of interstate commerce, and yet are held to be legitimate subjects for legislation. A license tax of $500 upon express companies doing business extending beyond the limits of a state, where the taxes upon companies doing business within the state was only $100, was held to be valid.

Osborne v. Mobile, 16 Wall. 479.

In Turner v. Maryland, 107 U. S. 38, the charge of a fee for the inspection of tobacco to be shipped out of the state was held legal.

In Huse v. Glover, 119 U. S. 543, the charge of tolls by the state upon locks placed in public waters was held not to be an interference with interstate commerce.

A state tax levied upon gross receipts of a railroad company which was engaged in both intrastate and interstate business is valid.

P. & R. Co. v. Pennsylvania, 15 Wall. 284.

In the case of Hopkins *et al.* v. United States, 171 U. S. 578, this court has practically decided that the business done at the Kansas City stock-yards does not constitute interstate commerce. It was there held that the business of the Kansas City Live Stock Exchange done at the stock-yards at Kansas City was not an incident to or so far related to interstate commerce as to bring it within the provisions of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The business of the Kansas City Live Stock Exchange, or rather that of its members, is closely identified with the business done by the Stock Yards Company. The members of the live-stock exchange occupy offices at the stock-yards; frequently attend to the driving and locating of stock in the yards when received; make the sales and direct the watering and the delivery. Hence, is it not possible that the business of the Kansas City stock-yards should be considered as interstate commerce to such an extent that the state has no power to legislate with regard thereto; while, on the other hand, the business of the live-stock exchange is so far removed from interstate commerce that congress has no power to act with reference thereto. In the opinion in the

case just referred to is found a general discussion of the subject as to what constitutes interstate commerce that is particularly applicable to the facts in this case. Reference is made to the wharfage cases above referred to, and others involving the same principles; and referring to the question with regard to the refusal of the Stock Yards Company to permit any one but members of the live-stock exchange to sell cattle at the yards, and to arbitrarily fix charges for such service by the exchange, the court says:

"But whether the charges are or are not exorbitant is a question primarily of local law, at least in the absence of any superior or paramount law providing for reasonable charges. (107 U. S. 691.) This case does not involve that question.

"If charges of the nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way, or else because they are in the nature of compensation for the use of property or privileges as a mere facility for that commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expense to those engaged in the business, yet, as the agreements are in regard to compensation for privileges accorded for services rendered as a facility to commerce or trade, they are not illegal as a restraint thereon.

"The facilities or privileges offered by the defendants are apparent and valuable. The cattle-owner has the use of a place for his cattle furnished by the defendants, and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners, and at the same time the most expeditious and effective. Each of these defendants has the right to have the

cattle which are consigned to him taken to the cattle-yards, where, by virtue of the arrangements made by defendants with the owners of the yards, the cattle are placed in pens, watered and fed, if necessary, and a sale effected at the earliest moment. It is these facilities and services which are paid for by a commission on the sales effected by the commission men. If, as is claimed, the commission men sometimes own the cattle they sell, then the rules do not apply, for they relate to charges made for selling cattle upon commission, and not at all to sales of cattle by their owners.

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. Welton v. Missouri, 91 U. S 275; Mobile County v. Kimball, 102 U. S. 691; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Hooper v. California, 155 U. S. 648, 653; United States v. E. C. Knight Co., 156 U. S. 1.

"But in all cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility."

See also Anderson v. United States, 171 U. S. 604.

The case of Munn v. The People of Illinois, 94 id. 113, is very closely in point. The facts of this case are too familiar to this court to need a review here, and we only desire to call the attention of the court to the similitude between the business

regulated and the business of the Kansas City Stock Yards Company. We know of no sufficient reason for distinguishing between the cases. In the opinion the court said:

"For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiff in error. From these it appears that, 'The great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor and sailed through the St. Lawrence directly to Europe. . . . The quantity (of grain) received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called *elevators*, because the grain is *elevated* from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and *elevated* from the bins by a like process into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago, and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the West with four or five of the states lying on the seashore, and forms the largest part of the interstate commerce of these states. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway-tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible

to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit.' In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms control them, and that the prices charged and received for storage were such 'as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication.' Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great states of the West' must pass on the way 'to four or five of the states on the seashore' *may* be a 'virtual' monopoly.

"Under such circumstances, it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman, pursues a public employment and exercises 'a sort of public office' these plaintiffs in error do not. They stand, to use again the language of their counsel, in a very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll, which is a common charge,' and, therefore, according to Lord Hale, every such warehouseman 'ought to be

under public regulation, viz.: that he . . . take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest and cease to be *juris privati* only,' this has been.

. . . . . .

"It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that 'it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern and, certainly, until congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs has encroached upon the exclusive domain of congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."

The cases of Budd v. State of New York, 143 U. S. 517, and Brass v. North Dakota, 153 U. S. 191, are also in point, as in both of these statutes regulating and limiting the charges of public elevators for receiving, storing and handling grain were upheld. Each of these public elevators was as much the instrument of interstate commerce, and the business done by and through it was as clearly connected with interstate commerce, as the business of the Kansas City stock-yards; yet, not-

withstanding this, statutes regulating their uses were sustained. No good reason exists for discriminating between those cases and the case at bar. The question whether the cattle yarded, fed and sold at the stock-yards were shipped from the state of Kansas or from some other state is immaterial; the transportation is ended when they reach the stock-yards. The cattle are merely held for the purpose of sale; a further transportation of them means a new proceeding taken in pursuance of new intentions regarding their disposition.

Neither does the fact that the animals are sometimes driven from one state to another in the disposition of the business of the stock-yards affect this case. The Stock Yards Company should not be permitted by reason of its location upon the state line to avoid the laws of either state, and cannot, by merely driving cattle across an imaginary line and driving them back again, say that by reason thereof the state has been deprived of its power to enforce its law. The driving of animals from place to place is merely an incident to the business done in the yards, and is not incidental to any question of regulation of commerce.

Coe v. Errol, 116 U. S. 517.
Chicago etc. Rld. Co. v. Becker, 32 Fed. 849.
Kentucky etc. Bridge Co. v. Louisville Rld. Co., 37 id. 567.

IX.

This Action Cannot be Maintained Because it is a Suit against the State of Kansas, and Because the Only Relief Sought Herein is to Enjoin the Prosecution of Criminal Actions Which Would Have to be Brought in the Name of the State of Kansas.

Chapter 240 of the Laws of Kansas passed at the session of 1897, after prescribing what shall be deemed to be public stock-yards, prescribes the rate which shall be charged for feed and yardage at such yards. These matters occupy all of sections 1 to 5, inclusive, of the act. Section 6 permits the owners of dead stock to sell the same as they may please. Section 7 is the only section of the act which prescribes any penalty for violation of the law, and reads as follows:

"SEC. 7. That any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for the first offense not more than $100; for the second offense not less than $100 nor more than $200; and for the third offense not less than $200 nor more than $500 and by imprisonment in the county jail not exceeding six months for each offense; and for each subsequent offense he or they shall be fined in any sum not less than $1000 and by imprisonment in the county jail not less than six months."

Section 8 prescribes the duties of the attorney-general of the state of Kansas under this law, and reads as follows:

"SEC. 8. It is hereby made the duty of the attorney-general to prosecute all violations of the provisions of this act."

It will be seen that no duty rests upon the attorney-general to secure to the patrons of the yards the rates mentioned in the act. The only duty which imposed upon him is to commence and prosecute criminal actions against persons violating any of the provisions of the act.

"A criminal action is one prosecuted by the state as a party against a person charged with a public offense for the punishment thereof." (Code of Procedure of Kansas, § 3.)

The attorney-general, in the answers filed in the court below, made the objection that these actions could not be prosecuted because in violation of the eleventh amendment to the constitution of the United States. (Record, pp. 902, 933.)

This case differs from the case of Smyth v. Ames, 169 U. S. 466. In that case the suits were brought against the state board of transportation, composed of the attorney-general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands and buildings, which board was charged by the law in question with the enforcement of the rates prescribed by that act. Such we understand to be substantially the provisions of all the laws which have been called into question in this court in similar cases in which this court has held that it has power to enjoin the actions of state officers.

In the case of Pennoyer v. McConnaughy 140 U. S. 1, the action was brought against the board of land commissioners of California to enjoin them from selling land which the complainants claimed to own. If the land belonged to the state it was the statutory duty of the defendant to make the sale. This

court held that an action to enjoin the defendant from selling the complainant's land was not an action against the state. In the case of *In re* Tyler, 149 U. S. 164, this court held that a proceeding in contempt against a state officer who had seized property not subject to levy under tax-warrants is in no sense a suit against the state. In the case of Scott v. Donald, 165 U. S. 68, this court held that a suit for damages against state officers who under color of an unconstitutional statute have seized and carried away liquors belonging to the plaintiff was not a suit against the state. In the case of Tindal v. Wesley, 167 U. S. 204, it was held that a suit against state officers to recover possession of real property which they claimed to hold for the state was not a suit against the state. The cases last mentioned are cited as authority for the decision in the case of Smyth v. Ames, *supra*, but we submit that they furnish no justification for the prosecution of the case at bar; neither does the decision in the Smyth-Ames case uphold the right to prosecute this action, but it rather comes within the decision of this court in the case of Fitts, Attorney-General, *et al.*, v. McGhee *et al.*, 172 U. S. 516, in which it was held that the federal court has no jurisdiction over an action of this nature brought merely for the purpose of testing the validity of a statutory enactment, where the only duties resting upon the defendant consist of obligations to commence criminal prosecutions. We take the liberty to copy at some length from the opinion of the court in this case, as follows:

"There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them,

under the sanction of an unconstitutional statute, from committing by some positive act a wrong or tresspass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney-general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney-general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizens, they may be individually proceeded against for such trespasses or wrongs. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.

"What has been said has reference to that part of the final decree which holds the act of February 9, 1895, to be invalid and inoperative. Whether the owners of the bridge and the

plaintiffs as their representatives were denied by the statute fair and reasonable compensation for the use of the property by the public, was a question that could not be considered in this case. That is not a matter to be determined in a suit against the state, for of such a suit the circuit court could not take cognizance.

"It remains only to consider the case so far as the final decree assumes to enjoin the officers of the state from instituting or prosecuting any indictment or criminal proceedings having for their object the enforcement of the statute of 1895. We are of opinion that the circuit court of the United States sitting in equity was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the state court. This view is sustained by *In re* Sawyer, 124 U. S. 200, 209, 210. It was there said: 'Under the constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. (Fenn v. Holme, 21 How. 481, 484–487; Thompson v. Railroad Co., 6 Wall. 134; Heine v. Commissioners, 19 id. 655.)' Again: 'The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes and misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative departments of the government.' At the present term of the court, in Harkrader v. Wadley, 172 U. S. 148, 169, 170, we said: 'In proceeding by indictment to enforce a criminal statute, the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state.' Again: 'Much more are we of opinion that a circuit court of the United States,

sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in state court in the name of a state to enforce the criminal laws of such state.' Undoubtedly the courts of the United States have the power, under existing legislation, by writ of *habeas corpus*, to discharge from custody any person held by state authorities under criminal proceedings instituted under state enactments, if such enactments are void for repugnancy to the constitution, laws or treaties of the United States. But, even in such case, we have held that this power will not be exercised, in the first instance, except in extraordinary cases, and the party will be left to make his defense in the state court. (*Ex parte* Royall, 117 U. S. 241; New York v. Eno, 155 U. S. 89; Whitten v. Tomlinson, 160 U. S. 231; Baker v. Grice, 169 U. S. 284.) But the existence of the power in the courts of the United States to discharge upon *habeas corpus* by no means implies that they may, in the exercise of their equity powers, interrupt or enjoin proceedings of a criminal character in a state court.''

It would seem that nothing more need be said in this case, and we therefore desire to submit that the appeal should be dismissed or the case remanded with directions to dismiss in the court below. Respectfully submitted.

A. A. GODARD, *Attorney-General.*

B. H. TRACY, *Assistant Attorney-General.*

OCTOBER 25, 1899.

No. 43. 1463
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JAMES H. McKENNEY,
Clerk
Supl. Br. of Godard & Tracy for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 13, 1899.

No. 43.

CHARLES U. COTTING AND FRANCIS LEE HIGGINSON, APPELLANTS,

vs.

A. A. GODARD, AS ATTORNEY GENERAL OF THE STATE OF KANSAS, AND THE KANSAS CITY STOCK YARDS COMPANY ET AL., APPELLEES.

Supplemental Brief on Behalf of Attorney General.

A. A. GODARD,
Attorney General.

B. H. TRACY,
Assistant Attorney General.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-11-'99

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In order that it may not be overlooked, we desire to call the attention of the court to the fact that immediately after the present attorney general entered upon the duties of his office, Hon. L. C. Boyle, who had just retired from that position, filed in this court and cause a motion to abate, upon grounds which amount substantially to the objection that the suit should be dismissed because of the fact that the term of office of the attorney general named as a defendant in the bills filed herein had ex-

pired. The motion, with proof of service and an argument in support thereof, were printed and filed in this court on January 14, 1899. A brief in opposition thereto was filed. Subsequently a motion was presented by the appellants to this court to revive the case in the name of the present attorney general. The motion to revive was allowed without prejudice to the motion to abate, which was passed, and should be considered by this court on the final determination of this case.

We desire to submit that the motion to abate should be allowed, and present the argument contained in the brief heretofore filed upon that subject as our argument thereon.

THIS IS A SUIT AGAINST THE STATE OF KANSAS.

In answer to the argument contained in the reply brief filed by the appellants, and in addition to what we have previously said upon this subject, we desire to add the following:

It is urged that this point has been waived because not presented by plea before the issues were joined. There is no force in this objection. The question was called to the attention of the court before any testimony was taken, as appears from the opinion of Judge Foster, already cited. The testimony was all taken in this case before the issues were joined and upon the application for a temporary injunction. Before any expense of taking testimony had been incurred the court had held that the suit was not one against the State, and if a plea had then been filed, it would have been a useless formality. The rights of appellants have not been prejudiced in any way. We apprehend also that, as

the complainants' bills show upon their face that the suits ought not to be maintained, this court will not order an injunction based thereon.

In the Smyth-Ames case the question as to whether that was an action against the State of Nebraska was raised for the first time in this court, and yet the question was considered and decided (169 U. S.; see p. 518).

In this connection we desire to call the attention of the court to the nature of the relief sought against the attorney general, and for that purpose quote the allegations of the bill of Charles U. Cotting upon this subject:

"That by said section 8 of said so-called act referred to herein as 'Exhibit A' it is made the duty of the said Louis C. Boyle as attorney general of the State of Kansas to prosecute all of the violations of the provisions of said act; that your orator fears that the said attorney general may cause the defendant corporation and any and all of its officers and agents who shall violate any of its provisions to be arrested and prosecuted; that he will attempt to enforce said so-called act through the courts of Wyandotte county, Kansas, and through the courts of the State of Kansas, by a multiplicity of criminal actions or proceedings against each and every person failing or refusing to comply with the provisions thereof, including the said defendant corporation and its officers and agents, thereby greatly harassing and annoying the said defendant corporation and its officers and agents and causing them great expense and consuming valuable time, unless the said defendant corporation, its officers and agents shall put in force at once the said charges and prices specified in said sections 4 and 5 of said so-called act, and shall obey and carry out all of the terms and provisions of the said act and each section thereof; and your orator fears that the said Louis C. Boyle, as attorney general, will proceed at once to carry into force said arrests and prosecu-

tions unless immediately restrained by the order and injunction of this honorable court."

Record, p. 12.

The prayer of the bill is of like tenor. It prays that the said Louis C. Boyle may be restrained from prosecuting the officers and agents of the stock yards company by arrest and otherwise.

Record, pp. 16, 17.

The bill of Francis Lee Higginson is in the same language and terms (Record, pp. 33, 37, 38).

The allegations of the bills and the contention of the appellants are that the injunctions should be allowed in order that a multiplicity of criminal suits may be avoided. This is not within the province of a court of equity; an injunction may in some cases be granted to restrain the prosecution of civil actions, but not to restrain the institution of criminal proceedings.

Harkrader *vs.* Wadley, 172 U. S., 148.

Neither does the fact that many criminal suits are threatened instead of one or few change the rule.

"That the defendants may be frequently indicted constitutes no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a State court."

Fitts *vs.* McGhee, 172 U. S., 516.

In the reply brief of the appellants it is assumed that it is the duty of the attorney general to enforce the law in question. An argument is made which is based upon the

fallacy that it is his duty to see that shippers secure the rates provided by the statute. Such is not the fact. The law prescribes that any persons violating its provisions shall be guilty of a misdemeanor. It also makes provision that the attorney general shall prosecute offenders thereunder.

It is the duty of the county attorneys of the State to prosecute violations of the criminal laws in the lower courts. The attorney general must appear in such cases in the appellate courts. The only additional duty imposed upon him is that of appearing in the lower courts. He cannot incite or institute proceedings unless complaint is made to him that the law is being violated. The bill alleges that the attorney general was intending to prosecute the officers and agents of the stock yards company, and an injunction was asked to restrain him from so doing. The attorney general could not verify a complaint unless he had knowledge of the facts upon which it was based. Naturally and necessarily he would have no personal knowledge of the facts upon which to commence proceedings; hence he could institute no proceedings without a complaining witness, and such witness might and probably would lay his case before the local county attorney rather than go to the remote capital of the State to seek the attorney general. The situation therefore presents this phase. This proceeding is brought to restrain the attorney general from acting when he cannot act except in pursuance of steps to be taken by others, and it is exceedingly doubtful if these steps would ever be taken or he be given the opportunity to act, and the only step which he could take after complaint had been made to him would be to commence a criminal action in the name of the State of Kansas in one of the courts of that State.

It should be borne in mind that the allegations of the bills are to the effect that the stock yards company through fear of the attorney general were intending to put into effect the rates prescribed by the law, and the primary object of the action is to enjoin that company from so doing. Supposedly the attorney general is only incidentally brought into the action, yet the contest is made by that officer alone. The stock yards company and its officers who are also made defendants file no answers in the case; on the contrary, they furnish the complainants with nearly all the testimony introduced in their behalf. The officers of the company show such a bias and prejudice in the case as to leave no room to doubt but that they are with the complainant in the case. The entire proceeding shows that it is a suit between the stock yards company on one side and the attorney general on the other. When the final adjudication was reached the appellants were allowed to appeal only on condition that the stock yards company should give a bond.

This bond to secure the repayment of overcharges was required, not of the appellants, but from one of the parties supposed to have been successful in the case, and the bond was immediately produced.

Record, pp. 947, 948, 961.

The conclusion which necessarily follows from the foregoing is that this action is brought for the purpose of testing the validity of an enactment of the Kansas legislature, and not for any other purpose, thus bringing it within the decision of this court in Fitts *vs.* McGhee, *supra.*

We desire to add that the granting of an injunction in this case would be a violation of section 720 of the Revised

Statutes of the United States, the language of which is as follows:

SECTION 720. "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

To enjoin the attorney general from proceeding in court against violators of law is equivalent to enjoining the actions of the courts themselves. Where a party is enjoined from prosecuting his case the effect is the same as if the court were enjoined from acting thereon.

Rensselaer & S. R. Co. *vs.* Bennington & R. R. Co., 18 Fed., 617.

In re Sawyer, 124 U. S., 200.

REASONABLENESS OF RATES.

The effort of appellants to claim that a different rule should be applied to the stock yards company in determining the question of reasonableness of rates from that applied to railroad, turnpike, and other companies should avail them nothing.

In the first place, the reasons for the rule adopted by this court are erroneously stated by the appellants. The right to regulate the business of stock yards exists because of the fact that it is impressed with a public use. The power to regulate the charges of railway, turnpike, and other corporations exists for the same identical reason, and none other. The reason why the courts have refused to interfere with legislation regulating railway rates unless it clearly

appears that such rates are confiscatory is not connected with the subject-matter of the regulation, but arises solely from the rule that legislation will not be held unconstitutional and void unless it clearly appears to be so. Every presumption is in favor of the validity of an enactment of the legislature. Granted that the legislature has the power to regulate, and it necessarily follows that such regulation will not be disturbed unless the power has been clearly abused.

The presentation of facts in this case by the appellants has been made in both briefs filed by them, and doubtless will be made upon the oral argument, with great ability, rare skill, and adroit touches of color, making their side of the case appear in its most favorable aspect. To properly answer such an argument is, indeed, a great task. We must ask the court to give all possible consideration to the record, and before going into the details of the case take a general view of the situation.

The Kansas farmer who fattens a few cars of cattle for the market subsists in the meantime quite largely upon the proceeds of corn sold at from ten to twenty-five cents per bushel, and hay sold at from three to five dollars per ton. When at last his cattle are ready he ships them a great distance and at high cost to Kansas City. There is but one market there, hence he must patronize it. He is not allowed to sell his cattle, but must employ a commissionman to do so. For a single car of twenty animals he must pay the commission dealer ten dollars. The animals are driven into a pen, where they stay a few hours and five dollars more is charged, besides which he is compelled to purchase feed at approximately ten times the price for which his own hay

and grain have been sold. When he has paid the railroad, commission, and stock-yard charges there is little left to represent the labor and capital invested in the animals.

The profits made by the stock yards company have been enormous. The appellants talk about the risk that has been incurred in the business. There has been no risk, unless it were when the business first started, and then it paid 14.47 per cent. the first year. (See table in our first brief, p. 6.) Since then it has been safe and profitable beyond the dreams of conservatism and avarice.

The profits shown in the past make the contention of the appellants seem most absurd. The figures given in the reply brief exaggerate the effect of the law. Still, taking the business of 1896 as a basis, the gross income was $1,023,870.20 (Record, p. 70). A reduction of $300,651.77 would equal 29 per cent.

Deducting from the gross income the expenses of operation and income from business and property not affected by the law, the percentage of reduction is much less than the figures mentioned in appellants' reply brief:

Gross income, 1896		$1,023,870 20
Expenditures of operation (Record, p. 70)	$365,712 49	
Received rents, outside property	6,007 45	
Received interest and dividends	5,591 53	
Income of horse and mule market	3,790 75	
		381,102 22
Net income from business affected		$642,767 98

The percentage which a reduction of $300,651.77 would make upon this sum is 46, which is the percentage of reduction upon the net income instead of 63, as claimed in the reply brief. The company declared dividends to the amount of 12.44 per cent. in 1896. A reduction of the entire net income to the amount of 46 per cent. would still have permitted dividends to the amount of 6.72 per cent.

A reduction of the net income of the company to the amount of 46 per cent. since its organization would have permitted the earning of enormous profits—several times as much as could in any light be considered as reasonable compensation for the value of the property employed.

In the reply brief just filed is reiterated at length the claim that the item of $169,584.65 charged by the company to construction in 1896 should have been charged to operation and maintenance. The company had already charged for maintenance of the yards the sum of $32,309.22 expended for repairs (Record, p. 70), making a total of $201,893.87 which the appellants claim to be the cost of repairs for a single year.

The total value of the improvements made upon the real estate used by the company was $1,480,000 (Record, p. 77). These consisted for the greater part of brick and frame buildings well built, pens constructed of heavy timber and very largely floored with vitrified brick, steel and stone bridges, and tunnels constructed with heavy masonry. Whether the cost of grading and filling the lands is included in this estimate or not we are now unable to say, but it is quite likely that such is the fact. These matters taken into consideration with the stipulation which shows the nature of the items, it seems to us, settle the question that

the company originally charged these items where they properly belonged.

We desire to make a more explicit statement of the reasons which compel us to believe that the item of $169,584.65 was covered by a stock dividend. The finding of the master is that it was after 1892 that the construction account was capitalized (Record, p. 71).

The amounts carried to construction on the books of the company were as follows:

1892	$85,076 58	(Record, p. 82.)
1893	87,149 70	(Record, p. 83.)
1894	252,751 87	(Record, p. 85.)
1895	178,584 40	(Record, p. 87.)
1896	176,394 60	(Record, p. 89.)
Total	$779,951 15	

It will be observed that the amount carried to the construction account for 1896, $176,394.60, includes the disputed item of $169,584.65, which is the amount remaining of the sum charged to construction account after deducting the sums received from sales of property (Record, p. 91).

The stock dividends declared to stockholders after 1891 were as follows (Record, pp. 79, 740–744):

1894	$268,100
1896	433,450
February 1, 1897	78,090
Total	$779,640

Amounts charged to construction account, 1892 to 1896, both years inclusive.....	$779,951 15
Amount of stock issued to cover same.....	779,640 00
Balance not capitalized.....	$317 15

In their reply brief appellants still urge that the construction account of 1896 was not capitalized, but if not, why was stock to that amount issued and distributed to stockholders? There had been no increase in the value of real property in 1896. No reason is given why the stock was issued, and we have only the bare statement of Mr. Morse that the account was not covered.

We have not claimed, nor do we claim, that the company should issue additional stock for any purpose. What its mode of conducting its private and internal affairs shall be in the future is immaterial, so long as its rates are reasonable and its service proper.

The contention that the company has reached its maximum of business is also erroneous. We urge that a reduction of rates will, in a measure, increase its business, and that the cattle business of the country tributary to Kansas City has greatly increased since the taking of evidence in this case and will probably still further increase is a matter of common knowledge, of which this court can take judicial notice.

With regard to the question as to what is a reasonable rate of interest for the stock-yards property to earn, we said but little in our former brief, taking it for granted that the court was already fully advised upon the subject. Appellants' counsel have in their reply brief reiterated state-

ments outside the record that are so manifestly unfair and unjust that we are constrained to reply. A list of old municipal bonds issued years since in the newer portions of the State, and therefore bearing high rates of interest, is selected from the list of those outstanding for the purpose of indicating the current rate which such bonds bear. They say "the most conservative investments in the State, such as municipal bonds, bear from seven to ten per cent."

Reply Brief, p. 34.

The average rate per cent. of all the county bonds issued in the State of Kansas for the first nine months of 1899 was 4.48 per cent. These usually sold above par. Choice county and city bonds issued in the State have repeatedly sold on a 3½ per cent. basis. No bonds are issued, even by school districts, bearing more than 5 per cent. interest. Money is being loaned on Kansas farms at 5 per cent. per annum. Business men in Kansas City, Kansas, and Topeka, can borrow money on thirty to ninety days' time at 6 per cent. The rates for small loans are a little higher, but not more than 8 per cent.

In the reply brief much is said touching the value of the land, and it is again attempted to be shown that the master underestimated its value. We insist that such is not the fact; we believe we have better grounds for claiming that his estimate is too high, but we do not care to discuss the subject further. If the court desires to investigate the evidence and does so, we have no fears that the master's figures will be increased.

Beginning on page 55 of the reply brief is presented an argument that the sum of $400,000 should be added to the

amount on which the company should be permitted to earn an income, because the master found that the company had approximately that amount on hand in cash and credits.

This is evidently an afterthought. We recall no testimony that such sum was used in the business. No mention of the matter has been made heretofore. It is apparent that no such sum of money is needed to carry on the business. The animals shipped to the yards are received in the morning and sold in the forenoon. The charges for yardage and feed are paid at once. The money is collected before the railroad companies are paid, hence there can be no use for capital in this branch of the business.

Attention is called to the fact that an error in computation was made on page 74 of our original brief. We regret the mistake and repeat the figures with the corrections made:

Value of real estate owned and used by the company		$3,600,626 00
Structures and improvements		1,480,000 00
Personal property on hand December 31, 1896		307,377 25
		$5,388,003 25
Deduct horse and mule market		430,420 00
		$4,957,583 25
Gross income of stock yards company, 1896		$1,023,870 29
Deduct amounts received from rents outside property	$6,007 45	
Deduct amounts received from interest and dividends	5,591 53	
Deduct expenditures of operation	365,712 49	
Deduct net income of horse and mule market	3,790 75	
		381,102 22
Net income from business affected by the law		$642,767 98

This is equivalent to a profit of 12.97 per cent. upon a value of $4,957,583.25, which is the rate per cent. earned by

the property affected by the law in 1896 under the master's valuations.

The statutory rates would have made the profits $300,651.77 less, or $342,116.21. This is equivalent to 6.9 per cent. upon $4,957,583.25.

The profits which would have been earned in 1896 if the statutory rates had been in force, $342,116.21, equal 6 per cent. upon $5,701,933.50, which is $744,350.25 more than the value of the property used in the business.

If we take the par value of the stock outstanding December 31, 1896, which was $7,368,650, of which $433,450 had been issued on June 30 of that year, and deduct therefrom the value of property not used for stock-yards purposes and not affected by the law, we have the following:

Par value of stock		$7,368,650
Value of property not used for stock-yards purposes	$1,200,000	
Value of horse and mule market....	430,420	
		1,630,420
Amount of stock affected by law		$5,738,230

The net income which would have been earned under the law in 1896, or $342,116.21, is equivalent to 5.96 per cent. of this sum; in other words, if the par value of the stock be taken as the measure of the value of all the property owned by the stock yards company, still the law in question, if applied to the business of 1896, would have permitted the company to have earned practically 6 per cent. upon all the property affected by the law.

It is urged by the appellants that the question involved

herein should be determined, not by the question as to how much the company may earn, but upon consideration of the value of the services rendered. In this they are arguing themselves out of court. They seem to forget in this, as elsewhere in their argument, that the law is presumed to be valid and the rates prescribed to be just, fair, and reasonable until they have proved them to be confiscatory. Evidence as to what rates are charged elsewhere might raise a presumption regarding the rates at Kansas City, but such presumption can have no weight against the presumption in favor of the validity of the law, and the rates charged at yards in other States where a less volume of business is transacted afford no guidance for the determination of this case (Smyth *vs.* Ames, 169 U. S., 540; 64 Fed. Rep., 165). Besides, unless the rates are confiscatory, the discretion exercised by the legislature in fixing rates cannot be interfered with by the courts.

It is claimed that the labor of distributing the hay sold is very great, and therefore the prices charged for feed are reasonable. The amount of hay consumed at the yards is approximately one thousand tons per month, or forty tons per day (Record, p. 141). If there are a hundred cattle to the pen a ton would be fed to four pens.

The argument that hauling a ton of hay into the yards and distributing it to four pens of cattle should give the company the right to add from two hundred to five hundred per cent. to its value is absurd.

If counsel for appellants are correct in saying that no feed is sold in Kansas and the law does not apply to the Kansas City Stock Yards Company, then the reduction in charges effected by the law is $76,174.20 less than we have figured

for the business of 1896, and the rates cannot be considered as confiscatory.

The appellants seem to argue that the enforcement of the rates prescribed by the law in question may be enjoined even though they are not confiscatory. This question has been set at rest and the rule governing the subject clearly enunciated in the case of San Diego Land and Town Co. *vs.* City of National City, 174 U. S., 739, where it was said:

"It is sufficient to say that upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety—and we cannot properly look at them in any other light—are such as amount to a taking of property without just compensation, and therefore to a deprivation of property without due process of law."

The substance of the decision is clearly stated in the syllabus, which is as follows:

"Courts will not interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under the circumstances, is just, both to the owner and the public."

It remains for this court to decide, if the case shall progress so far, whether or not the appellants have shown that the rates prescribed by the act of March 12, 1897, are so plainly and palpably unreasonable as to amount to a taking of property for public use without just compensation therefor. We urge that they have not so shown; that the rates fixed are just and reasonable and are only a wholesome

restriction upon a business impressed with a public use and upon a corporation which has been guilty of great extortion in the past.

A. A. GODARD,
Attorney General.

B. H. TRACY,
Assistant Attorney General.

WASHINGTON, D. C., *November* 10, 1899.

No. 48 /

Br. of Godard for

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Filed No. Jan. 14, 1901.

In the Supreme Court
of the United States.

CHARLES U. COTTING, AND FRANCIS LEE HIGGINSON, *Appellants*,
vs.
A. A. GODARD, AS ATTORNEY GENERAL OF THE STATE OF KANSAS, THE KANSAS CITY STOCK-YARDS COMPANY, *et al.*, *Appellees*.

BRIEF ON BEHALF OF ATTORNEY GENERAL.

A. A. GODARD,
Attorney-general.

In the Supreme Court
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CHARLES U. COTTING, AND FRANCIS LEE HIGGINSON, *Appellants*,
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No. .....

BRIEF ON BEHALF OF ATTORNEY GENERAL.

IN again presenting this case to the court we shall not attempt to argue all the points which have been raised, but will rely principally upon the former briefs filed, desiring to add such other views and authorities as seem proper.

JURISDICTION.

We desire to again urge that the federal courts are and have been without jurisdiction of this case. It is a suit against the state of Kansas, and therefore violative of the provisions of the eleventh amendment to the constitution of the United States.

The sole purpose of the action, so far as the attorney general is concerned, is to enjoin the commence-

ment and prosecution of criminal actions in the name of the state of Kansas, and in the courts of that state, and is therefore entirely outside the jurisdiction of a court of equity, and not a proper subject for an equitable action.

These objections were overruled in the court below with the general statement that "the court has jurisdiction to enjoin a state officer from enforcing an unconstitutional law," and citing the case of Reagan v. Trust Company, 154 U. S. 362. (See Cotting v. Kansas City Stock-yards Company, 79 Fed. Rep. 679, 681.)

The Reagan case is not in point. It was brought against the railroad commissioners and the attorney general of Texas to restrain them from enforcing certain railroad rates and regulations prescribed by the railroad commissioners, under a statute of Texas authorizing such action on their part, and charging the attorney general with the duty of collecting certain penalties from the railroad corporations violating the regulations so fixed. The injuries sustained by a railroad company through an unlawful exercise of the powers vested in the railroad commissioners under this act would be manifested in a civil action, or actions for the recovery of money, and in no other way, so far at least as the attorney general is concerned. An injunction to restrain the commencement of civil suits is a well known and admittedly proper exercise of equity power.

By the statute under consideration in this case, the only duty imposed upon the attorney general is that of prosecuting violators of the law.

"SEC. 7. That any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for the first offense not more than $100; for the second offense, not less than $100 nor more than $200; and for the third offense, not less than $200 nor more than $500 and by imprisonment in the county jail not exceeding six months for each offense; and for each subsequent offense he or they shall be fined in any sum not less than $1000 and by imprisonment in the county jail not less than six months.

"SEC. 8. It is hereby made the duty of the attorney general to prosecute all violations of the provisions of this act."

All criminal suits in Kansas must be brought in the name of the state. General Statutes of Kansas, 1899, paragraph 4251, is as follows: "A criminal action is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof."

The only person other than the stock-yards company and its officers named as a party defendant is the attorney general, and the only mode in which it is sought to prevent official action is to restrain him from commencing criminal suits on behalf of the state. The object of this suit is the state of Kansas. Its intent is to reach the state, and to prevent it from acting, by restraining the only officer through which it can move in such cases, namely, the prosecuting attorney; and not only that, but it is also sought to employ the equity powers of the federal courts to enjoin the institution and prosecution of criminal action, the use of which power for such purposes has been frequently denied but not heretofore granted.

The decisions of this court cited in support of the

assertion that a suit against an officer of a state is not a suit against the state itself are the following:

Poindexter v. Greenhow, 114 U. S. 270.
Allen v. Baltimore & Ohio Rld. Co., 114 id. 311.
Pennoyer v. McConnaughy, 140 id. 1.
In re Tyler, 149 id. 164.
Reagan v. Farmers L. & T. Co., 154 id. 362.
Scott v. Donald, 165 id. 58.
Tindal v. Wesley, 167 id. 204.
Smyth v. Ames, 169 id. 466.

The case of Poindexter v. Greenhow was an action to restrain the sale of personal property taken under a tax levy.

The case of Allen v. Baltimore & Ohio Rld. Co. is almost identically the same. In both cases it was held that a distraint for taxes should be prevented, as tenders had been made in tax-receivable coupons.

The case of Pennoyer v. McConnaughy was a suit against the board of land commissioners of the state of Oregon to enjoin them from reselling swamp lands to which the complainant asserted title.

In re Tyler was a *habeas corpus* proceeding by a state officer who had been arrested for contempt by reason of his having seized for taxes property in the hands of a receiver appointed by a circuit court of the United States, in which it was held that such contempt proceedings were in no sense a suit against the state.

The case of Reagan v. Farmers L. & T. Co. has been previously mentioned.

The case of Scott v. Donald was brought to enjoin state officers from seizing private property sought to be taken under an unconstitutional statute, which action was held not to be a suit against the state.

Tindal v. Wesley was an action of ejectment brought against officers who claimed to hold for their state.

In the Smyth v. Ames cases the defendants were, aside from certain railroad companies, the persons holding the offices of attorney general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands and buildings, constituting the state board of transportation, together with two other persons who were secretaries of that board. It is unnecessary here to state the purposes of those actions, as the court is already familiar with them. Attention is called, however, to the fact that the only duties directly imposed upon the attorney general under the law there involved were such as pertained to the functions of the state board of transportation. The statute is quoted in the opinion, 169 U. S. 472, *et seq.* The courts of general jurisdiction in Nebraska are the supreme and district courts, with jurisdiction as shown by paragraphs 2399 and 2417 of the Compiled Statutes of Nebraska, 1895, as follows:

"2399. SEC. 13. (*Jurisdiction.*) The supreme court shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, *quo warranto*, and *habeas corpus*, and shall have appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees of the district courts, in all matters of law, fact, or equity, where the rules of law or the principles of equity appear from the files, exhibits or records of said court to have been erroneously determined." (Const., art. VI, § 2.)

"2417. SEC. 24. (*Jurisdiction.*) The district court shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." (Const., art. VI, sec. 9.)

Criminal cases must, under the foregoing statutes, be instituted in the district courts, and they can only reach the supreme court of the state upon appeal. It was the duty of the county attorney and not the duty of the attorney general to prosecute such cases in the lower court. The statutes of Nebraska fixing the duties of the attorney general and of county attorneys are as follows:

"The attorney general shall appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when requested by the governor or either branch of the legislature, appear for the state and prosecute and defend in any other court, or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested." (Compiled Statutes of Nebraska, 1895, par. 5024.)

It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute and defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested." (Compiled Statutes of Nebraska, 1895, par. 603.)

It therefore appears that no injunction could have been granted in the Nebraska cases that would have had the effect of preventing the attorney general from instituting criminal suits, as no duty devolved upon him so to do. The penalties provided for violations of the Nebraska rate law are suits for damages, to be brought by the shipper, as provided in section 8, or the criminal proceedings provided in section 9, which, under the statutes quoted, could only have been brought by county attorneys and in the lower courts.

It also appears that none of the authorities cited in support of the position that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional statute, to the injury of plaintiff's rights, is not a suit against the state, has gone to the extent of deciding that an injunction can be granted where such injunction would have the effect of preventing the institution of criminal suits.

It is settled that federal courts will not grant an injunction against a state officer when it is conceded that he is proceeding under a valid state statute. (Harkrader v. Wadley, 172 U. S. 148.)

The question which is raised here is as to whether or not the circuit court of the United States has jurisdiction of a suit to enjoin the attorney general of a state from instituting criminal prosecutions in the name of the state, where it is claimed that the statute under which the attorney general will proceed is unconstitutional.

Before proceeding with a further discussion of this question, let us examine the allegations of the complainants against the attorney general. We have seen that the statute imposes no duty upon the attorney general except that of prosecuting in the name of the state criminal suits to punish violators of the law. But for the presence of sections 7 and 8 of this law the attorney general would have nothing to do with it. If the statute had merely fixed prices at which the stock-yards business should be done, then questions with regard thereto would only be judicially determined in suits between the company and its patrons. The legislature saw fit, however, to make a

violation of the law a misdemeanor and charged the attorney general with the prosecution of such offenses, imposing upon that officer the duties which usually devolve upon the county attorney.

The allegations of the bills filed by Cotting and Higginson with reference to the then attorney general are the same, and are as follows:

"That by said section 8 of said so-called act, referred to herein as 'Exhibit A,' it is made the duty of the said Louis C. Boyle, as attorney general of the state of Kansas, to prosecute all of the violations of the provisions of said act; that your orator fears that the said attorney general may cause the defendant corporation and any and all of its officers and agents who shall violate any of its provisions to be arrested and prosecuted; that he will attempt to enforce the so-called act through the courts of Wyandotte county, Kansas, and through the courts of the state of Kansas, by a multiplicity of criminal actions or proceedings against each and every person failing or refusing to comply with the provisions thereof, including the said defendant corporation and its officers and agents, thereby greatly harassing and annoying the said defendant corporation and its officers and agents, and causing them great expense and consuming valuable time, unless the said defendant corporation, its officers and agents, shall put in force at once the said charges and prices specified in said sections 4 and 5 of said so-called act, and shall obey and carry out all of the terms and provisions of said act and each section thereof; and your orator fears that the said Louis C. Boyle, as attorney general, will proceed at once to carry into force said arrests and prosecutions unless immediately restrained by the order and injunction of this honorable court." (Record, pp. 12 and 33.)

The prayers of said bills, so far as they relate to the attorney general, are the same, and are as follows:

"That the said Louis C. Boyle, as attorney general, be adjudged and decreed from attempting, as against

said defendant corporation or any of its officers, agents, servants, or employees, to enforce the provisions of the said so called act or any part thereof, and also that said order and injunction issue against the said Louis C. Boyle, as attorney general, commanding him to refrain from harassing and annoying, by prosecution or otherwise, under the provisions of the said so-called act, the defendant corporation, the said Charles F. Morse, or any of the other officers, servants, agents or employees of the said defendant corporation herein named." (Record, pp. 16 and 37.)

It is now settled that this court will look at the nature of the case, as well as the nominal parties, to determine whether a suit is within the prohibition of the eleventh amendment. (Poindexter v. Greenhow, 114 U. S. 270, 287.)

This suit is not brought against the attorney generral in his natural person, but only in his official capacity. It is not alleged that he will touch or interfere with any of the property of the complainants or the stock-yards company. The object of the suit is to prevent the state itself from proceeding in its own name, in its particular province, and in the exercise of functions peculiar to itself. It is true that neither the revenues nor the property of the state are involved, but it is sought by this action to reach that which is more vital to the state than its material interests, namely, its executive and judicial powers. An injunction is asked against the attorney general to restrain the institution of criminal suits, in order that the state courts may not try them.

In the cases of Poindexter v. Greenhow and Allen v. Baltimore & Ohio Railroad Co., *supra*, it was held that injunction would lie to prevent the seizure of prop-

erty by officers of the state of Virginia after a tender of the amount of the taxes had been made in coupons which the court held to be properly receivable as such; but thereafter, in *Ex parte* Ayres, 123 U. S. 443, this court held that a suit against the attorney general, to enjoin him from bringing any suit in the name of the commonwealth of Virginia to enforce the collection of taxes for the payment of which coupons attached to her bonds had been tendered, was a suit which the circuit court of the United States had no jurisdiction to entertain, as such suit was in law and fact a suit against the state of Virginia.

An examination of the Ayres case will show that the question involved was almost identical with the one we are here discussing. The state of Virginia had issued bonds with coupons attached, which recited that such coupons should be receivable in payment of state taxes. Subsequent legislation had provided that all state taxes must be paid in money. Suits in injunction had been maintained in the federal courts to restrain distraints for taxes in cases where tenders of payment in such coupons had been made, and these injunctions had been twice approved by this court prior to the passage of the act of May 12, 1887. By that act the attorney general was expressly charged with the duty of bringing suits in the name of the commonwealth for the collection of delinquent taxes, notwithstanding any tender that may have been made. Under the decisions of this court, previously made in the Poindexter and Allen cases, the act was void because in violation of the federal constitution. Subjects of Great Brit-

ain brought an action in the circuit court of the United States for the eastern district of Virginia against Ayres, attorney general of that state, and others. The prayer of the bill was that the attorney general of the state of Virginia, and the commonwealth's attorneys for the counties, be restrained by injunction from commencing and prosecuting any suits under the act of May 12, 1887, for the recovery of taxes against parties alleged to be delinquent, but who, in fact, had tendered tax-receivable coupons in payment of taxes due. (Opinion, on page 485.) An injunction was granted, which was disobeyed by the attorney general. In a contempt proceeding he was fined, and ordered committed until it was paid. From this arose the *habeas corpus* proceeding in this court, reported in 123 U. S. 443.

In the opinion, on page 497, it is said:

"The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its governor and attorney general, according to the precedents in such cases. (New Jersey v. New York, 30 U. S., 5 Pet. 284, 288, 290; Kentucky v. Dennison, 24 How. 66, 96, 97; Rule 5 of 1884, 108 U. S. 574.) If a decree could have been rendered enjoining the state from bringing suits against its taxpayers, it would have operated upon the state only through the officers who by law were required to represent it in bringing such suits, viz., the present defendant, its attorney general, and the commonwealth's attorneys for the several

counties. For a breach of such an injunction these officers would be amenable to the court, as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.

"The nature of the case as supposed is identical with that of the case as actually presented in the bill, with the single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

Mr. Justice FIELD, in his special concurring opinion, on page 508, says:

"I concur in the judgment discharging from arrest and imprisonment the attorney general of Virginia, and other officers of the state, who were adjudged by the circuit court to be guilty of contempt in refusing to obey the order of that court in the case of Cooper v. Marye, and were fined, and committed until the fine should be paid, and they should purge themselves of their contempt by doing the acts commanded. I also concur in the main position stated in the opinion of the court, upon which the discharge of the petitioner is ordered, namely, that the case of Cooper v. Marye was in law and fact a suit by subjects of a foreign state against the state of Virginia. To a suit of that character the judicial power of the United States cannot, by the eleventh amendment of the constitution, be extended. The object of that suit was to enjoin the attorney general and the commonwealth's attorneys of the several counties and towns of Virginia from bringing any suits in the name of the commonwealth to enforce the collection of taxes for the payment of which coupons originally attached to her bonds had been tendered. To enjoin the officers of the commonwealth, charged with the supervision and management of legal proceedings in her

behalf, from bringing suits in her name, is nothing less than to enjoin the commonwealth, for only by her officers can such suits be instituted and prosecuted. This seems to me an obvious conclusion."

The dissenting opinion seems to be based upon the view that, in all cases where jurisdiction depends upon the party, it is the party named in the record, a doctrine that has been overthrown by this court.

The Ayres case has been followed in the cases of Harkader v. Wadley, 172 U. S. 148, and Fitts v. McGhee, 172 id. 516.

This suit ought not to be maintained, because its sole purpose is to enjoin, in a court of equity, the prosecution of criminal actions.

We have already stated that the only duty devolving upon the attorney general under the statute in question is that of instituting and prosecuting criminal suits which could only be brought in the name of the state of Kansas and in the state courts, and that the only remedy sought against him was to prevent him from so doing. Under the repeated decisions of this court the circuit court was without jurisdiction, and the action should have been dismissed.

In the case of *In re* Sawyer, 124 U. S. 210, Mr. Justice GRAY said:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanor, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the ex-

ecutive and administrative department of the government.

"Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned. (2 Hale, P. C. 147; Gee v. Pritchard, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689, 690; Attorney General v. Utica Ins. Co. 2 Johns. Ch. 371, 378.)"

In the case of Harkrader v. Wadley, 172 U. S. 170, it was decided that injunction will not lie to stay criminal proceedings in a state court by a federal court.

"We are of opinion, then, that a court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused. Much more are we of opinion that a circuit court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a state to enforce the criminal laws of such state.

The opinion shows that the Harkrader case was not so decided because of section 720 of the Revised Statutes, but upon grounds which make it applicable to this case.

In the case of Fitts, Attorney General, v. McGhee, 172 U. S. 516, it was decided that—

"A circuit court of the United States has no jurisdiction of a suit in reality against a state, and brought without its consent, by a citizen thereof, though it in-

volves a question under the constitution of the United States.

"A federal court is without jurisdiction of a suit by a private person against the executive and law officers of a state to test the constitutionality of a statute by enjoining any proceeding for its enforcement, where the defendants are charged by the statute with no specific duty in the matter, and have neither done nor attempted any act of wrong or trespass against the person or property of complainant, and, should they act, must do so by formal legal proceedings in the courts in the name of the state. Such a suit is, in effect, one against the state, and is within the prohibition of the eleventh constitutional amendment.

"A federal court of equity has no power to enjoin the institution or prosecution of indictments or other criminal proceedings in a state court." (Syllabus, 19 Supreme Court Reporter, 269.)

It is urged, therefore, that the circuit court had no jurisdiction of this case because it is a suit against the state, and also because it is sought to employ the equity arm of the court to enjoin the commencement and prosecution of criminal suits which can only be brought in the state court and in the name of the state.

We do not claim, as stated by counsel for appellants, that the case of Fitts v. McGhee overrules Reagan v. Farmers' Loan and Trust Co. and Smyth v. Ames, but we claim that there are exceptions to the rule laid down in the Reagan case, and that as the Fitts-McGhee case constituted an exception thereto so does this case, and for stronger reasons. The fact that the legislature has directed an act to be done cannot give a citizen of another state the right to sue the state in a matter concerning such legislative action, neither will the fact that the act so directed is a criminal suit give a court of equity jurisdiction to restrain

such proceeding, upon the claim that the law is void. If the legislature has, by the passage of a law, charged an officer to perform some act, the doing of which will amount to a trespass if the law is void, the courts may assume that the officer will do as the statute directs, and enjoin if it finds the law bad. But neither the person who has done or intends to do a criminal act nor the beneficiary of such act has the right to go into court to obtain an injunction against the law officers of the state to prevent a prosecution, under the claim that either the statute creating such offense or the one directing its prosecution is void.

It is suggested by counsel for appellants that the state has waived the jurisdictional question, and Clark v. Barnard, 108 U. S. 436, is cited. In that case the state appeared by cross-bill and claimed the subject-matter of the action. It appears from the Ayres case that the suit in which the attorney general was held for contempt had been argued on both sides, yet the contempt proceedings were held void because it was a suit against the state. In the Fitts-McGhee case the attorney general had filed his answer in the original suit, and the action had proceeded to judgment before the institution of the contempt proceedings which were held void because such original action was a suit against the state.

In the case of Smyth v. Ames, the question as to whether that was an action against the state of Nebraska was raised for the first time in this court and was here considered and decided. (169 U. S. 518.)

The question of jurisdiction here raised is, so far as it relates to the power of a court of equity to enjoin

criminal proceedings, one of subject-matter, which cannot be waived, and one which may be raised at any time. The other branch of the objection, as to the case being one against a state, is very closely akin to the question of subject-matter, so that it should not be considered as having been waived, unless such waiver has been made in an express manner, by some person authorized to surrender the rights of the state.

EQUITY RULE 94.

Before proceeding to discuss the merits of this case, we desire to suggest that this suit should have been dismissed by the circuit court because of non-compliance with equity rule 94, as the bills show a very imperfect compliance with that rule, and the subsequent progress of the case indicates very clearly that it is such a suit as the rule seeks to prevent. That the allegations of the bills filed by Cotting and Higginson are meager and incomplete in their allegations under said rule, see record, pages 13, 14, 34, 35, and 36. Neither the stock-yards company nor its officers filed any answers in the suits, but allowed decrees *pro confesso* to be taken. The principal witnesses for the complainants are the officers of the stock-yards company, and particularly those named as defendants, Charles F. Morse, Harry P. Child, Eugene Rust, and Elliott E. Richardson.

The testimony of these witnesses shows that their interests and sympathies were with the complainants. When the final decree was rendered and the bills dis-

missed, an order was made, presumably on the application of the complainants, that, notwithstanding the dismissal of the suits, the temporary injunctions granted therein should be continued in force on condition that the defendant The Kansas City Stock Yards Company should give bond in the sum of $200,000, conditioned for the payment of damages occasioned by such injunction, which bond was given, signed by the stock-yards company, by C. F. Morse, vice-president and general manager, and E. E. Richardson, secretary, two of the defendants in said suit. (Record, pp. 947, 948, 961, 962.) The amount of stock held by complainants did not justify them in entering upon this litigation unless it was collusive, as their joint holdings amounted to but nine-tenths of one per cent. of the outstanding capital stock. (Record, pp. 2, 24.)

These facts, taken together, point inevitably to the conclusion that this case is prosecuted by the stock-yards company in violation of the spirit of equity rule 94, and that the suits were commenced merely for the purpose of testing the validity of a law.

REASONABLE INCOME.

Is the due-process-of-law provision of the fourteenth amendment violated by the law under consideration? This will be the only question discussed in this brief, aside from what has been said. As to the other points, we will rely upon the briefs heretofore filed by us. In the reply brief of the appellants, the argument upon this subject is skilfully conducted into diverging byways quite far from the main path. The appellants attempted to show to the circuit court that the application of this law to the business of the Kansas City stock-yards would amount to a taking of their property without due process of law. A demonstration of the question could have been made if the law had been obeyed for a short time, but, instead, a suit was instituted as soon as the law took effect, and a restraining order has been in force ever since. The actual effect of the law in operation must be, therefore, to a large extent conjectural. The burden of proving that the statute is unconstitutional rested upon the appellants, and as the objection urged does not appear upon the face of the law, but is a latent one, with only a contingent existence, which has been twice denied by the circuit court, this court will not be justified in holding the law void unless it clearly appears that the application of the statutory rates will deprive the appellants of their property. The act of the state legislature will not be overthrown unless it is clearly proven to have transgressed the bounds of legislative power. The right of the legislature to regulate the business of the stock-yards company is admitted.

The argument that such a company should be permitted to earn a larger income than a railroad, turnpike or water company is fallacious. The rights of a stockholder in any of the corporations subject to legislative control should be equal, under the constitutional provision we are considering. The stockholders in each are usually private persons. The moneys invested are private funds, and any deprivation of income which would amount to a taking of private property withont due process of law in one case should be so in all, so far as the investor is concerned. It is true that the rights of the public in a business subject to legislative control vary, and it is also true that the nature of investments in purposes subject to regulation differs, and that persons investing in a small and uncertain or fluctuating business should be permitted to receive a greater return than from a large, steady business, so that no fixed rule can be prescribed by which to determine when a legislative regulation amounts to a taking without due process of law. (San Diego Land and Town Co. v. National City, 174 U. S. 739.)

As against the claim that the stockholders of the stock-yards company are entitled to receive larger earnings than investors in railway, turnpike and water companies, we wish to say that the testimony shows that this company has been guilty of extortionate charges in the past; a great part of the stock held by the appellants, and which is the basis of their claim, has been given them without cost, and has been paid for by the patrons of the yards—the public. (Record, p. 342.) The stock is practically all held by the

same parties who have been stockholders from the beginning. Like the business of a railway, turnpike or water company, the damage done a single individual is too small to permit him to fight the corporation single-handed, and the state must step in and protect him; but every reason why the public has an interest in such other corporations applies with equal force and to an equal extent to this, as none are greater monopolies, and none are greater necessities than this one is under present business and trade conditions. It must be remembered that Kansas City is one of the two largest cattle markets in the world, and that the shippers from a great area of country are absolutely compelled to patronize these yards if they would market their animals. (Record, p. 196.) The starting of competitive yards is impossible; they would be opposed by the railroad companies, which now have their facilities for handling this business. The packing-houses are built adjacent to the present plant, with conveniences for buying there, and the commission firms who handle all the stock sold there would be greatly injured by the division of their business, and a division of the market would be detrimental to all the large single interests centered there; so that the opposition of the present stock-yards company and these other interests would prevent capital from engaging in the same line of business. The value of this property has been built up very largely by its power and physical ability to make and enforce exorbitant demands. Of course, the greater its charges and earnings the greater the value of its stock, and the more money it

has been able to expend in and upon property. The fact that the plant is given an overvaluation is clearly shown by the testimony of Col. C. F. Morse, who has been the general manager of the business since its infancy, and who has had the management and control of almost the entire operation of the business and affairs of the company for many years, besides being a large stockholder in the company. He testifies (record, p. 324) as follows:

"Ans. I have tried to explain that the good-will is a part of the value of the property, and the whole property would be decreased in value probably more than one-half if the rates made by the Kansas law were put into force, and I think the good-will would shrink out of sight."

Colonel Morse placed the value of the property of all kinds owned by the company, including an estimated value of $2,000,000 for good-will, at $9,500,000. (Record, p. 319.)

If the effect of the law was such as to absolutely destroy the business of the stock-yards company, it would still have left property much greater in value than one-half of Colonel Morse's estimate, unless the master has placed a value upon the property much greater than its market value, irrespective of the good-will of the business or its value as a going concern.

One-half of Colonel Morse's estimate is.....	$4,750,000
Value of property owned by company and adding its value to stock, but not used in the business, and which would therefore not be affected by destruction of stock-yards business (finding 41, page 76.).....	1,200,000
	$3,550,000

This sum is less by $55,000 than the master estimated the value of the naked land.

The profits arising from the business of the stockyards company seem to have mysteriously fallen off in 1896. The master's table, on page 79 of the record, which is undisputed by the appellants, except as to two items of dividend stock, shows that the total amount of cash invested by the stockholders in this corporation from 1871 to 1896 is $2,484,500. Multiplying the sums invested by the number of years which elapsed to 1896, and dividing that sum by the total amount invested, we have 6.29 as the average number of years such moneys were so invested up to the close of 1896. We have, therefore, as profits upon an investment equivalent to $2,484,500 for six years and four months, cash dividends of $4,660,976, and stock dividends amounting to $4,962,240. Such enormous profits arising from a monopoly most certainly justify the legislature in regulating vigorously the charges which the public are compelled to pay at the yards.

The figures in the summary mentioned in appellant's reply brief (pp. 56, 57) are manifestly unfair and unjust, both in the estimates of the value upon which the income was produced as well as in the effect the law would have upon the business. There is no good reason for claiming that the law would only permit an income of $176,322.71, as stated. Finding No. 33 (pages 69, 70) clearly sets forth the income and expenses for 1896 by items. None of these is disputed by the appellants, but they claim that the items set forth in finding No. 33½

should be included in the maintenance account. This is clearly a mistake, as all these items have been included in the improvement account. They were charged to construction when made. An examination of finding No. 33½ shows that the master had taken all these into account in estimating the value of the improvements, and if they should be considered as a part of the maintenance, then these items should be deducted from the previous value of the improvements on the property.

Finding No. 33 shows that $32,309.22 expended for repairs had been previously charged to maintenance, and this was considered sufficient by the stock-yards company until the necessities of this case led it to claim otherwise. The consideration of this item is of great importance in this case, as the sum so expended in betterments represents five per centum interest on $3,391,693. It may be difficult sometimes to separate expenditures properly chargeable to maintenance or improvements; but when new structures are created, of an entirely different character from the old, representing many times the cost of the old, and adding greatly to the permanency and value of the property, it certainly is not proper to charge the total cost of such improvements to maintenance. Besides which, the principal items in finding No. 33½ represent the cost of new construction.

Upon this subject the circuit court was extremely liberal to the complainants, saying as follows:

"A very large part of the sum last mentioned—all of it, in fact, except about $6000—was expended in building new structures and making permanent improvements, which increased the value of the com-

pany's property to the extent of such expenditures, and therefore cannot be regarded as operating expenses in estimating the net profits. The company itself took this view of the question by charging them to 'construction account,' and in due season it would doubtless have capitalized the amount of such expenses by issuing stock therefor, as it had previously capitalized other expenses of a similar character. At the same time, as buildings, pens, pavements and other similar structures deteriorate in value somewhat from year to year, even where they are repaired in the ordinary way, it is eminently proper, in estimating the net profits, to set aside annually out of the gross income a certain sum to cover such depreciation. The testimony does not show with any great degree of accuracy what sum should be thus set apart annually, in addition to the cost of ordinary repairs; but as the sum of $32,309 appears to have been expended in the year 1896 for ordinary repairs, which sum was charged to the profit-and-loss account under that head, the court concludes that the sum of $50,000 is an adequate amount to cover the annual loss for derioration not made good by ordinary repairs. Fifty-six thousand dollars has accordingly been deducted from the sum of $169,584.65 charged to 'construction account,' and the balance of that sum has been added to the net profits. The result is, that the net income for the year 1896 was $476,984.08, plus $113,584.65, originally charged to 'construction account,' or, in the aggregate, $590,568.73. If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896, the income of the stock-yards company would have been reduced that year to the extent of $300,651.77, leaving a net income of $289,916.96, on the assumption, which is a very reasonable one, that its expenses would have remained a constant quantity, and that the volume of its business would not have been sensibly increased by the reduction in rates. Its income would have been adequate to yield a return of 5.3 per cent. on the value of the property used for stock-yards purposes, as fixed by the master, or 4.6 per cent. on the sum for which the property has been capitalized, first de-

ducting from that sum the value of all property represented by the capital stock which is not used for stock-yards purposes.

"V. Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about fifty per cent., and that it prevents it from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises, still the court is not prepared to hold that the statute is confiscatory, and that it deprives the company of its property without due process of law. It is common knowledge that large sums of money are invested in securities which do not yield a return exceeding five per cent. on the investment, and it is further manifest that the business of the stock-yards company as conducted is not subject to the same risks of loss from bad debts and declining prices which affects many other business enterprises. Moreover, legislative enactments cannot be declared void because the courts entertain doubts of their expediency or validity or because such enactments tend to lessen the valuation which has theretofore been placed on certain private property. In a great variety of ways laws which cannot be challenged have an inevitable tendency to affect injuriously the value of property. The power of the state to fix the maximum price that shall be charged for the use of property affected with a public interest necessarily implies the power to lessen its value somewhat, or at least to lessen it as measured by the income which it might be made to produce if free from public control. In the very nature of things, considerable scope must be given to legislative discretion in determining the validity of statutes like the one now in question, since the judiciary have no power to prescribe a schedule of maximum rates, and it is only where there has been a clear abuse of power, where the rates prescribed by a statute are manifestly unreasonable and operate to deprive a citizen or corporation of that which justly belongs to them, even as against the public, that the courts have power to intervene. We are constrained to hold that the case at bar is not of that character." (Record, pp. 945, 946.)

The manifest error of complainants in deducting the construction account from maintenance renders the figures in their tables, on pages 56 and 57 of the reply brief, absolutely worthless.

What is the investment affected by the law under consideration? The stock-yards company has invested in other things besides the facilities for doing those things mentioned in the law. It holds bank stocks, packing-house stock, lands that never have and never can be used for stock-yards purposes, and which it leases to tenants, and in addition has engaged in a separate business, namely, the horse and mule business, which is done in the state of Missouri, and is not affected by the law in question. This buiness is not necessary for the purposes of the stock-yards. Horses and mules are not shipped with cattle. Their market is not affected by the cattle, sheep or hog market. Horses and mules are not dealt in by the packing-houses; they are sold by and to different classes of people from those dealing in the food-producing animals handled in the yards, and the business is handled in an entirely different way. (Record, p. 136.) The company might equally well engage in the business of handling poultry, eggs, dairy products, or even grain, as all these are produced by the farmers; but if it were so engaged would there be any contention that the stock-yards property should be permitted to earn enough from its business to pay a percentage of profit upon such other business? The land for the horse and mule market was purchased in 1893 and 1894. (Finding No. 24, p. 66.) This property could not have been completed before 1895; conse-

quently the year 1896 was the first or second year in which this property was used by the stock-yards company, and it was a new business venture in the year we are considering. It was not successful in that year. The property cost $360,643.86. The master valued it at $430,420. (Findings Nos. 24 and 34, pp. 66 and 72.) The net income for 1896 was only $3790.75, or one and one-half per cent. of its cost, and eighty-eight hundredths of one per cent. of its value (page 72). Probably the investment was a wise one, and the business is by this time paying a good interest upon its value; but whether it is or not, it is outside of the business we are contemplating, outside of the law we are considering, and outside of our state, and no reason exists why the public doing business at the stock-yards should have imposed upon it the burden of paying interest upon this investment. The master did not find that the horse and mule market was a part of the stock-yards, nor did he find that its property, income or expenses should be included in the computations to determine the profits of the business. In findings Nos. 34 and 35, pages 66 and 67, he recites the extent and cost of the property so used and something of the nature of its business. In finding No. 44, pages 71 and 72, is stated the expense and income of this business, also the estimated value of the property used therein, and also the percentage of profits earned thereon. In finding No. 40, page 75, is mentioned the fact that this expensive property was equipped to handle four hundred per cent. more animals than were ever received there in one day.

Taking Judge THAYER's figures (record, p. 944), and deducting the horse and mule market and its business, we have the following:

Real estate	$3,600,626 00
Improvements	1,480,000 00
Personal property	307,377 25
	$5,388,003 25
Deduct horse and mule market	430,420 00
	$4,957,583 25
Gross income	$1,012,271 22
Expenditures	535,297 14
Balance	$476,974 08
Add increased value from improvements	113,584 65
Net income for 1896	$590,558 73
Deduct income from horse and mule market,	3,790 75
Net income from business affected by the law	$586,767 98
Statutory rates would have reduced this amount	300,651 77
Leaving net profit	$286,116 21

It is true this is a reduction of fifty-one per cent. of the net income, but it leaves a profit amounting to 5¾ per cent. upon an investment of $4,957,583.25, and we contend that Judge THAYER was entirely too liberal in charging $56,000 of the expenditures mentioned in finding No. 33½ to maintenance. The estimate of Judge FOSTER (record, p. 871) is abundantly liberal. The stock-yards company evidently considered their profits for 1896 greater than the sum computed by Judge THAYER, as they declared dividends in that year upon the entire amount of capital stock outstanding to the amount of 12.41 per cent. (Record, p. 79.) To have reduced this dividend 51

per cent. would have made it 6.09 per cent., certainly a reasonable one.

The appellants also attempt to show, by swelling the value of the plant to undue proportions, that the law would permit only a trifling dividend. They add three items in their reply brief, on page 56, none of which are proper. They are:

Omission of parcels used for dumping manure and offal	$126,140 00
Working capital, consisting of cash and credits,	400,000 00
Expenditures for packing plants	817,944 28

The testimony shows that the dumping-grounds consist of cheap lands which the stock-yards company is filling up, thereby making them immensely valuable. (Record, pp. 75, 192, 193, 246, 267; original brief for attorney general, pp. 52, 53, 54.) These lands cannot be used for stock-yards purposes, and will probably be sold when filled. The company is therefore disposing of its offal at a profit, and the benefits to be derived therefrom should be anticipated, if any of the expenditures are to be considered. It is manifestly unfair to claim that the company should be permitted to compute the value of these partially improved speculative lands as a part of its capital upon which to dissipate the earnings of the business.

The fifth item is the surplus mentioned in finding No. 33½. We find no testimony showing that this or any other sum is used as a working capital, with the exception of the $307,377.25 used in buying feed, etc., and which sum has been included in all our calculations and those of the master as working capital and a basis for dividends. The master was not shown

that any further sum than the amount we have mentioned was required as working capital, and the fact that all business of the stock-yards company is conducted on a cash basis, and no expenditures are necessary in carrying on the business, except for feed before money is collected, conclusively disproves the claim as to this item.

The item of expenditures for packing plants is also erroneous. The benefit derived from the location of these plants was the enhancement in value of the stock-yards property, which investment has been returned to the stock-yards company many fold.

Much argument is advanced as to the great expense of delivering the feed in small parcels. These deliveries are all made with horses and wagons belonging to the company, two men going with each team, sixteen to eighteen teams being required to deliver the hay and grain so used. (Record, p. 124.) The total income received from hay and grain in 1896 was $298,197.15, and the net income was $187,994.69. Dividing this by eighteen, we find that the hay and grain delivered by each team during the year brought an average of $16,566, and the net profit arising from the delivery of each team averaged $10,444. This business was handled by the company at an expense which was certainly less than $1000 per annum for each team, and probably less than $500. The feeding is practically all done within a few hours' time (record, p. 367), and the teams so employed can thereafter engage in other duties.

In conclusion, we desire to submit the opinions filed

in the circuit court, that of Judge FOSTER being found on page 862 of the record, and the one by Judge THAYER on page 940, as giving satisfactory reasons for the judgments then entered.

A. A. GODARD,
Attorney General of Kansas.

JANUARY 8, 1901.